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THE
ONTARIO REPORTS

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (THE COURT OF APPEAL FOR
ONTARIO AND THE HIGH COURT OF
JUSTICE FOR ONTARIO).

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CITED [1940] O.R.

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JUDGES
OF THE
SUPREME COURT OF ONTARIO
DURING THE PERIOD OF THESE REPORTS.

THE COURT OF APPEAL FOR ONTARIO.

THE HON. ROBERT SPELMAN ROBERTSON, Chief Justice of Ontario.

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| " | " | WILLIAM RENWICK RIDDELL, J.A. |
| " | " | WILLIAM EDWARD MIDDLETON, J.A. |
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THE HIGH COURT OF JUSTICE FOR ONTARIO.

THE HON. HUGH EDWARD ROSE, Chief Justice of the High Court.

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| " | " | GEORGE ALEXANDER URQUHART, J. |
| " | " | JAMES GERALD KELLY, J. |
| " | " | CHARLES PERCY PLAXTON, J.** |

* The Hon. Nicol Jeffrey, J., died on 20th July, 1940.

** Charles Percy Plaxton, one of His Majesty's Counsel, was appointed a Justice of the High Court of Justice for Ontario on 27th January, 1941.

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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF ONTARIO

[COURT OF APPEAL.]

Rex v. Levine.

Criminal law—Common gaming houses—Playing at a mixed game of chance or skill—Automatic machine operated for amusement purposes only—Opportunity to play game again dependent upon score obtained in first operation—The Criminal Code, R.S.C. 1927, ch. 36, secs. 226, 229(2) and sec. 986(4), as amended by 1938, 2 Geo. VI, ch. 44, sec. 46.

An automatic "pin-ball" machine the operation of which costs five cents and does nothing but amuse the operator is a machine used or intended to be used for vending services and is therefore excluded from the operation of sec. 986 of the Criminal Code as amended by 1938, 2 Geo. VI, ch. 44, sec. 46. Hence the owner of premises who has such a machine on his premises for the purpose of operation by the public is not guilty of keeping a common gaming house: *Rex v. Collins* (1938), 71 Can. Crim. Cas. 272, not followed.

AN appeal by the accused from his conviction by Magistrate D. M. Brodie at Windsor on a charge under sec. 229(2) of The Criminal Code that the accused did unlawfully act or behave as the master of, or as the person appearing to have the care, government or management of a disorderly house, to wit, a common gaming house situated at 1097 Drouillard Road, a place where persons resort for the purpose of playing at a mixed game of change or skill, or did assist in the care, government or management as aforesaid.

October 23rd, 1939. The appeal was heard by ROBERTSON C.J.O., MIDDLETON and MASTEN JJ.A.

R. H. Greer, K.C., for the accused, appellant.

C. R. Magone, K.C., for the Crown, respondent.

October 30th, 1939. The judgment of the Court was delivered by ROBERTSON C.J.O.:—An appeal from a conviction of Police Magistrate D. M. Brodie, at Windsor, on a charge under sec. 229, subsec. (2) of the Criminal Code, that the accused at the City of Windsor did unlawfully act or behave as the master of, or as the person appearing to have the care, government or

management of a disorderly house, to wit: a common gaming house, situated at 1097 Drouillard Road, a place where persons resort for the purpose of playing at a mixed game of chance or skill, or did assist in the care, government or management as aforesaid.

The accused keeps a cigar store at the premises mentioned, and beyond an admission that he was the keeper of the premises and that he got some portion of the earnings of the machine hereinafter mentioned, the only evidence to support the charge was that of two members of the police force who gave evidence with reference to a "pin-ball" machine which was set up in the premises. Without too much detail, the operation of this machine may be described as follows. On placing a large five-cent piece in a slot, five balls are released into a runway. By the manual operation of a "plunger" these balls are moved, one at a time, to a higher position, from which of its own motion the ball runs down the surface of an inclined board in which are set a number of pins, among which the ball finds its way. The pins are electrically connected with a register, and the ball in its course down the surface of the board, by contact with the pins, causes a score to be registered by the machine, the score varying with the particular pins that the ball happens to strike in running down the board. Nothing whatever is delivered by the operation of the machine to the player. If, when he has played the five balls, his registered score exceeds a certain minimum, the machine automatically indicates that, without depositing another coin, he is entitled to play the machine again, one or more times, according to the amount of the score, and he may proceed accordingly. The machine is obviously one from the operation of which the player can get nothing but amusement, and it costs him five cents to operate it.

In *Rex v. Wilkes* (1930), 66 O.L.R. 319, this Court quashed a conviction for keeping a common gaming house under sec. 229. In that case there was found on the premises an automatic machine which delivered to the player an article of merchandise commonly sold over the counter at the price of the coin put in the machine to operate it. Nothing else was delivered to the player except that, if his play was fortunate, he received one or more tokens or "slugs", with which he could again operate the machine without depositing another coin, but also without having a chance of anything further being delivered to him as a

result of the further operation. It was held that this was not gaming or playing at any game of chance or at any mixed game of chance and skill, there being no chance of loss to the player. It was said that the object of the statute was not "to prohibit harmless amusement that costs nothing", and the fact that the amusement might be more or less, depending upon the result of the first operation, was obviously not deemed to make the operation of the machine a game of chance within the meaning of sec. 229.

The decision of this Court in the Wilkes case was approved by the Supreme Court of Canada in *Roberts v. The King*, [1931] S.C.R. 417, and the reasons for the decision in the Wilkes case were adopted.

There has been no alteration in sec. 229 since these decisions, nor has sec. 226, which defines a common gaming house, been altered in any particular relevant to the present charge. In 1938, however, by sec. 46, ch. 44, 2 Geo. VI, a new subsec. 4 was substituted in sec. 986. It is as follows:

"46. Subsection four of section nine hundred and eighty-six of the said Act, as enacted by section twenty-seven of chapter eleven of the statutes of 1930, is repealed and the following substituted therefor:—

"(4) In any prosecution under section two hundred and twenty-nine any automatic or slot machine used or intended to be used for any purpose other than for vending merchandise or services shall, and any such machine used or intended to be used for vending merchandise, shall, if the result of one of any number of operations of it is, as regards the operator, a matter of chance or uncertainty or if as a consequence of any given number of successive operations it yields different results to the operator or if on any operation it discharges or emits any slug or token, other than merchandise, be deemed to be a means or contrivance for playing a game of chance notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance and if any house, room or place is found fitted or provided with any such machine there shall be an irrebuttable presumption that such house, room or place is a common gaming house."

It is upon this subsection that the Crown relies. For the appellant it is contended, broadly, that it is not to be assumed that the purpose of the subsection is to make the providing of inno-

cent amusement a criminal offence, and that upon a fair interpretation that is not its effect.

This substituted subsec. 4 of sec. 986 was considered by the Court of Appeal of Saskatchewan in *Rex v. Collins* (1938), 71 Can. Crim. Cas. 272. In that case an automatic machine resembling in its operation the machine in question here, although not identical in every particular, was held to be one that by virtue of this new subsection should "be deemed to be a means or contrivance for playing a game of chance".

The Magistrate in the present case considered that he should defer to the opinion of the Saskatchewan Court of Appeal, and therefore convicted appellant, although it is to be noted that in the Saskatchewan case the Court of Appeal found difficulty in applying the provision of the new subsec. 4 as to "an irrebuttable presumption", and found other evidence on the record that was considered sufficient to sustain the conviction without reference to any "irrebuttable presumption" created by the statute.

While there is not in this case such other evidence as would support the conviction without the aid of the statutory "irrebuttable presumption", and in that respect the decision by which the Magistrate was governed does not cover this case, I do not think this case can be properly disposed of merely by a consideration of the effect of the provision as to an irrebuttable presumption which the Saskatchewan Court left undetermined. It is necessary in my opinion, and with the greatest respect for the opinion of the Court of Appeal of Saskatchewan, to consider whether the machine in question in this case is one to which the new subsection 4 applies. With great respect, it seems to me that some of the difficulties with which the Saskatchewan Court of Appeal found itself beset in its effort to find a reasonable interpretation of the concluding clause of subsection 4 creating an irrebuttable presumption, arise from giving too broad an interpretation to the earlier part of the subsection.

In approaching the interpretation of such a declaratory statute, one must recognize that the legislative purpose may be merely to clarify the existing law and not to alter it. One is not to assume, unless it is necessary to do so, that, while leaving unaltered sec. 226, which defines a common gaming house, and sec. 229, which makes it a crime to keep a common gaming house, Parliament intended, by a mere declaratory section dealing only with the evidence necessary to prove the offence, to extend the

operation of sec. 229, and to make criminal conduct that had formerly been considered innocent. If it is found necessary to conclude that the new subsec. 4 of sec. 986, notwithstanding its collocation with other sections under the general heading, "Evidence on the Trial," does in fact add to the offences that are punishable under sec. 229, the subsection then comes within the rule that penal statutes must be construed strictly. If it is capable of a reasonable construction that will avoid the penalty in any particular case, one must adopt that construction. While the Court is to construe every statute with reference to its true meaning, and according to the true intention of the legislature, it is at the same time essential, in the case of a criminal statute, that there should be reasonable certainty as to its meaning, and that the offence charged is within the terms, as well as the purpose, of the statute.

Turning then to the construction of the new subsection 4, it is plain that automatic or slot machines used or intended to be used for the purpose of "vending services" are entirely excluded from its operation. The phrase "vending services" and the word "services" are new to the sections of the Criminal Code that deal with common gaming houses, and they are not defined. I know of no principle of construction that would warrant the Court in giving to these words which are inserted in the statute, not to alter the existing law applicable to machines properly within that description, but to except such machines from the scope of this new provision, any narrower meaning than they properly bear in English speech. The word "service" or "services" is properly used as meaning "help", or "benefit" or "advantage" conferred. I do not know why amusement, which is all that is got by the operation of the machine in question, may not properly be spoken of as a "help", or a "benefit" or an "advantage." In one way and another, many wise people spend a good deal of time and money in obtaining amusement, and to a normal person it is almost one of the necessities of life. In my opinion it does no violence to the language of the statute in question to say that an automatic machine that does nothing but amuse is a machine used, or intended to be used, for vending services, and is therefore excluded from the operation of the subsection.

The meaning proper to be given to the words "vending services" is discussed in the judgment of the Saskatchewan Court of Appeal in the *Collins* case, and I disagree with that judgment,

with deference. After pointing out that Parliament had in mind three classes of machines; (1) those which vend services, (2) those which vend merchandise, and (3) those which perform functions which are neither a vending of merchandise nor a vending of services, the judgment in the *Collins* case proceeds to say that this statute "is so worded that we must find room in it, not for two but for three kinds of results obtainable by the operation of various machines: a vending of merchandise, a vending of service, and something else which is neither of these, but which nevertheless is real and may be described." I do not find in this any justification for restricting the one class that is wholly excluded from the operation of the statute to any narrower limits than are required by the words describing it. Nor do I think it necessary to resort to any such method of interpretation to give a fair meaning to the other terms of the statute, or to find room for the third class of machines. There may well be machines that, while vending services, including amusement, have gaming for their real purpose, and machines that vend merchandise, but have gaming as their substantial purpose. Such machines serve as illustrations of a machine whose use or intended use is, in truth, for a purpose other than for vending either merchandise or services, namely, for the purpose of gaming, and, in my opinion, they may more reasonably be considered to have been the objects of the legislative prohibition than a machine that furnishes nothing but simple amusement.

In my opinion, so long as the definition of a common gaming house contained in sec. 226 remains unaltered, to support a conviction for keeping a common gaming house on evidence such as in this case will require a more certain declaration of the intention of Parliament to extend the meaning of that term beyond its own definition than can be discovered upon any justifiable construction of the new subsec. 4 of sec. 986.

The appeal should be allowed and the conviction quashed. The order for destruction of the machine should be set aside.

Appeal allowed and conviction quashed.

[COURT OF APPEAL.]

Rex v. Charles McDonald.

Criminal Law—Murder—Circumstantial evidence—Finding of guilt by jury—Powers of Court of Appeal—Publication and distribution before trial of a fictional account of murder in a magazine—Warning by trial Judge to jury to disregard anything contained therein—Contempt of Court.

On the appeal by the accused from his conviction on a charge of murder it was contended by counsel for the accused that the evidence at the trial was as consistent with the innocence as with the guilt of the accused and that on the evidence no rational and unprejudiced jury could draw the inference that the accused was guilty of murder. Counsel for the accused stated that no complaint could be made as to the charge of the trial Judge to the jury.

Held that upon a perusal and consideration of all the evidence it was impossible to say that the evidence did not establish facts from which the jury was entitled to draw the inference of guilt or to say that the jury was not warranted in concluding that the evidence was inconsistent with the innocence of the appellant.

On the appeal the accused also contended that the publication in a magazine before the trial of a fictional account of the murder accompanied by an actual picture of the appellant may have caused a miscarriage of justice. The publication of this article was known to counsel before the trial and the matter was discussed with the trial Judge, who in his charge to the jury warned the jury to banish from their minds anything contained in the article.

Held that the course adopted by the learned Judge probably was the best possible under the circumstances and that in any event it was agreed upon by all parties and after a trial and judgment it could not be availed of for the purpose of securing a new trial. The Court observed however that the publication of the magazine immediately before the trial in the county from which the jury would be drawn was contempt of Court and could be summarily punished as such.

AN appeal by the accused Charles W. McDonald from his conviction by Roach J. and a jury on a charge of having murdered his wife, Adeline McDonald.

October 30th and 31st, 1939. The appeal was heard by ROBERTSON C.J.O., MIDDLETON, MASTEN, HENDERSON and MCTAGUE JJ.A.

J. Sedgwick, K.C., and *W. G. Kerr*, K.C., for the accused, appellant.

C. R. Magone, K.C., for the Crown, respondent.

November 7th, 1939. The judgment of the Court was delivered by MASTEN J.A.: The appellant was tried at Chatham by the Honourable Mr. Justice Roach and a jury for the murder of his wife, Adeline McDonald. The jury found the appellant guilty with a plea for mercy and he was sentenced to be hanged on the 30th day of November, 1939. It is not in controversy that the evidence is purely circumstantial.

The principal ground of appeal is that the evidence is as consistent with the innocence as with the guilt of the accused; consequently that the Crown has failed to satisfy the onus that rests upon it. In other words, that on the evidence no rational and unprejudiced jury properly instructed could draw from this evidence an inference of fact that the accused was guilty of the crime charged.

There is, and could be, no complaint on the part of the appellant that the jury was not properly instructed, and as to the quality and capacity of the jurors I quote the opening words of the charge of the trial Judge:

"Gentlemen of the jury, may I add my own words of commendation to those addressed to you this morning by counsel for the Crown and counsel for the accused, for the very obvious careful attention that you have given to the evidence adduced in this trial thus far. That attention bespeaks a thorough understanding and complete comprehension by you of your serious duties and responsibilities which I feel you will, to the extent that God has given you understanding, discernment and experience, faithfully discharge."

The jurisdiction conferred upon this Court by sec. 1014 of the Code is as follows:

"On the hearing of any such appeal against conviction the court of appeal shall allow the appeal if it is of opinion,

(a) That the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported, having regard to the evidence; or

(b) That the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law; or

(c) That on any ground there was a miscarriage of justice; and

(d) In any other case shall dismiss the appeal."

The authority so conferred by the statute, and the method of its application to circumstances, such as exist in the present case, is considered and elucidated by the cases of *Gauthier v. The King*, [1931] S.C.R. 416; *Fraser v. The King*, [1936] S.C.R. 296, and the English cases there discussed.

In the *Gauthier* case it was laid down by the Court, speaking by Anglin C.J.C., as follows:

"Assuming that the question, whether there was any evidence to support a conviction, should be deemed a question of law, the

question whether the proper inference has been drawn by the trial Judge from facts established in evidence, is really not a question of law, but purely a question of fact for his consideration.

In *Fraser v. The King*, [1936] S.C.R. 296, Rinfret J., speaking for the Court, says at p. 300:

"It would appear, therefore, that, when the evidence in a criminal case is purely circumstantial and at the same time equally consistent with the innocence as with the guilt of the accused, the Court of Criminal Appeal in England regards that evidence as insufficient to justify the jury in convicting, holds the verdict unsatisfactory and quashes the conviction, on the ground that it cannot be supported, having regard to the evidence.

"To a certain extent, this would assimilate verdicts based on circumstantial evidence 'as consistent with the innocence as with the guilt of the accused' to verdicts where it is claimed that there is no evidence at all to support them, the view being that the court of appeal is empowered to set aside those verdicts on the ground that they are unsatisfactory, whether on account of a total lack of evidence or for want of sufficient legal evidence to support them.

"Let it be granted, however, that such a question should be deemed a question of law, or of mixed law and fact, when once it is established that the evidence is of such a character that the inference of guilt of the accused might, and could, legally and properly be drawn therefrom, the further question whether guilt ought to be inferred in the premises is one of fact within the province of the jury."

This Court is necessarily unaware of the views of the jury regarding the facts and circumstances from which they drew the inference of guilt. Those remain locked up in the jury room. All that the Court knows is the inference of guilt which the jury drew from the facts. That inference as well as the antecedent findings of fact is, as laid down in the *Gauthier* case, a question of fact for the jury.

As we understand the principle or rule established by the cases to which reference has just been made, it is our duty to consider all the evidence adduced, while directing our minds especially to the question whether this jury could, from the facts which it deemed proved, conclude that such facts are inconsis-

tent with the innocence of the accused, and draw the further inference of fact that he is guilty.

Accordingly, without rehearsing here such facts and circumstances detailed in the evidence as seem to us to warrant the verdict of the jury, it suffices to declare that, upon a perusal and consideration of all the evidence, the Court unanimously finds that it is impossible to say that the evidence does not establish facts from which the jury was entitled to draw the inference of guilt which it has found, or to say that the jury was not warranted in concluding that the evidence is inconsistent with the innocence of the appellant.

We have not omitted to consider the suggestion that the jury's recommendation to mercy ought to be taken into consideration in disposing of this appeal. While it may be that in another quarter that recommendation may well be a factor for consideration, none the less in this Court our jurisdiction is, by the Code, strictly limited to the one question, can the verdict of the jury be supported, having regard to the evidence?

We desire to express our obligation to counsel for the accused for his great assistance, which enables us to feel complete assurance that none of the evidence supporting his contention has escaped our consideration.

The second ground of appeal is that before the trial, and almost co-incident with it, a certain American publication was sold in and about the neighbourhood of Chatham. It contained a fictional account of the murder by a husband of his wife, which was in some particulars identical with the facts of the present case, and was accompanied by an actual picture of the appellant. The suggestion of the appellant is that this publication may have come to the notice of the jury and may well have occasioned a miscarriage of justice, thus necessitating a new trial. Mr. Sedgwick says he became aware of the circumstances above mentioned shortly before the trial opened and that he discussed the matter with the trial Judge in his Chambers, whereupon the course adopted was agreed upon by counsel for the accused and for the Crown, and in his charge to the jury the learned trial Judge spoke as follows:—

“I admonish you now, as I admonished the gentlemen of the grand jury, that your verdict, whatever it may be, shall be based upon the evidence and the evidence alone. As has been truly stated by counsel for the Crown, a case of this character is bound

to provoke a very great deal of discussion. The news of this woman's death under the circumstances, as they have been related to you in evidence, was undoubtedly published in the press; indeed I have seen a novel written by a novelist, if you please, based on the story of this tragedy, in which the novelist drew to a very large extent upon his or her imagination. Gentlemen, if you have read the newspaper accounts of this tragedy, or if perchance you have read the novel to which I referred, I ask you now to banish from your minds anything that you may have read concerning this case, anything you may have heard concerning this case outside of the evidence as it fell from the lips of the witnesses during the course of this trial, and also any preconceived ideas you had with respect to this case; let your verdict, whatever it may be, have as its foundation the sworn evidence as you have heard it during the course of this trial."

We are informed that the Crown Counsel in his opening to the jury used language to a similar effect.

There is no evidence before this Court that the publication was ever seen by any jurymen much less that it in any way affected the opinion of any jurymen.

The course adopted may have been and probably was the best possible in the circumstances. In any event, it was agreed on by all parties, and, after a trial and judgment, could not be availed of for the securing of a new trial.

We desire, however, to say that there can be no doubt of the gross impropriety of putting in circulation, immediately before the trial, in the county from which the jury to try the case is to be drawn, a magazine containing what purports to be a description of the occurrence with a pretended confession of guilt. Such conduct is undoubtedly contempt of Court, and may be summarily punished as such. It may well be a criminal offence also, and that regardless of the actual outcome of the trial. *Rex v. Tibbits*, [1902] 1 K.B. 77. The publishers of the magazine, which comes from Chicago, are beyond the jurisdiction of the Courts of this Province, but a local newsdealer who, to obtain the meagre profit to be got by the retail sale of the magazine which may prevent or defeat the course of justice in his county, is not exempt from punishment.

The result is that the appeal must be dismissed.

Appeal dismissed.

[J. G. KELLY J.]

Ireland v. Cutten.

Contracts—Land—Oral promise to permit plaintiff to reside on premises during her lifetime—Statute of Frauds—Entry into possession—Part performance—Consideration—Corroboration.

The plaintiff brought this action against her nephew for a declaration that she was entitled to occupy certain lands and premises rent free for the period of her natural life, and she relied in support of her claim on an oral agreement whereby the father of the defendant had promised the plaintiff that she could occupy the premises in question as her home, rent free during her lifetime.

Held, that the oral agreement was established, and that the plaintiff was not merely a tenant at will of the property, and was entitled to the declaration claimed. There was consideration for the defendant's father's promise since the plaintiff and her husband had abandoned a *bona fide* intention of returning to Australia, where they had been living, in exchange for the defendant's father's promise. The Statute of Frauds did not afford a defence since the entry by the plaintiff into possession of the premises was a sufficient act of part performance to take the case out of the Statute.

AN action for a declaration that the plaintiff is entitled to occupy the lands and premises in the City of Toronto known as 63 Regal Road rent free for the period of her natural life.

The action was tried by J. G. KELLY J. without a jury at Toronto.

A. G. Slaght, K.C., and *G. A. Martin*, for the plaintiff.

F. J. Hughes, K.C., for the defendant.

August 15th, 1939. J. G. KELLY J.:—The action and counter-claim here to be determined concern the right to possession of land and premises in the City of Toronto known as No. 63 Regal Road. The precise nature of the issues will later appear, but it is first necessary to state the facts and circumstances, as I find them, out of which these issues arise.

The plaintiff is a married woman, sixty-three years of age. In the year 1905 she married Ernest Ireland, an Australian at that time attending the Agricultural College at Guelph, and in the same year went with him to Australia where they made their home. She had two married sisters (since deceased) resident in Toronto: Mrs. Moncur and Mrs. Lionel Forbes Cutten, the mother of the defendant. The three sisters were very fond of one another, and Lionel Forbes Cutten appears to have been deeply attached to, and anxious to please, his wife.

In 1909 the plaintiff and her husband came to Canada for a temporary visit. Before leaving Australia, they gave up the rented house they had occupied there and placed their furniture

in storage. While in Toronto, they were guests of the plaintiff's sisters and their respective husbands, staying about half the time in each sister's home. This visit lasted about six months; they left Australia in May and returned there in December.

In 1915 the plaintiff and her husband came again to Canada. This time they did not store their furniture or surrender the apartment they had been occupying in Australia; but a married sister of Ernest Ireland took over the apartment and used their furniture. Later, some time in 1920, after they had decided to remain in Canada, they caused this furniture to be sold. In 1915, the Empire was at war, and Ernest Ireland's business in Australia seems to have been badly hit. This, no doubt, made the trip to Canada more convenient than it might otherwise have been, but I believe the plaintiff and her husband when they say that the visit was not originally intended to be more than temporary.

Commencing about 1916, Ireland attempted without success to get established in business here. It may be that, if any of his ventures had turned out well, he would have given up his intention of returning to Australia after the War had ended, but that is pure speculation. Up to the year 1920, the plaintiff and her husband had not established any home of their own in Canada, were still dividing their time as guests between the homes of the plaintiff's sisters, and I find that they continued, until the autumn of 1919, to regard their stay in Canada as temporary only.

In December, 1919, Lionel Cutten purchased vacant land on the south side of Regal Road in the City of Toronto. This land had a frontage of about 100 feet on Regal Road and extended south, a distance of about 156 feet, to Davenport Road. Referring to the registered description, it comprised all of lots 151 and 150 according to Plan D-1364. The land was acquired by two deeds from the same grantor. By the first deed, dated 3rd December, 1919, Cutten acquired 60 feet on Regal Road, consisting of all of lot 151 and the east 10 feet of lot 150, saving the southerly 20 feet of both lots. By the second deed, Cutten acquired all of lots 151 and 150 not included in the first grant. Thereafter the land so acquired was treated and used as one parcel. Cutten at once proceeded to erect a large and costly house on the land, which was completed that winter. Actually the house is situated entirely on the land contained in the first deed but, as I have said, the land was all treated as appurtenant

to the house. On the 4th March, 1920, the plaintiff and her husband, without anything in writing to show their title, went into possession of the house and lands I have just described, (now known as No. 63 Regal Road), where they still remain.

The plaintiff says that she and her husband took possession of No. 63 Regal Road pursuant to a definite oral agreement made between her and Lionel Cutten. To this, the defendant, who is the only child and sole executor of Lionel Cutten, sets up the absence of any memorandum in writing evidencing the agreement and pleads the Statute of Frauds. In reply the plaintiff alleges part performance of the oral agreement sufficient to take it out of that statute.

I have refrained from describing the alleged oral agreement, chiefly, because of the insistence with which Mr. Hughes pressed the point that I must not consider any oral contract relating to lands until I first find acts of part performance sufficient to entitle me to do so. With great respect, I cannot conceive of a case which, under the authorities, would more plainly show part performance of some agreement concerning the lands here in question. The plaintiff is in possession of No. 63 Regal Road; she went into occupation with the knowledge of the owner, Lionel Cutten; she must have done so pursuant to some agreement.

The doctrine of part performance is discussed in Fry on Specific Performance, at page 286 *et seq.* It is stated, at page 286: "Still more clearly the acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract."

Again, at page 287: "It is not only in contracts for a sale or a lease that possession is part performance. It may let in parol evidence of any contract explaining the possession."

The doctrine is also discussed in Volume 31 of Halsbury's Laws of England, 2nd edition, commencing at page 359. The following passage appears at page 360: "If, however, the acts of part performance are referable to some contract, and are consistent with the contract alleged, evidence is admissible as to the precise terms of the particular contract which is alleged. In effect, the necessity of writing is dispensed with, and the Court is entitled to find what the parties have actually agreed,

although the terms of the agreement go beyond those to which the acts of part performance in themselves point."

There is no doubt that equivocal acts will not constitute part performance so as to dispense with the necessity of writing. Thus, the rebuilding by a tenant of a party wall was not part performance of an alleged contract with the landlord for a further lease for ten years in return for such rebuilding: *Frame v. Dawson* (1807), 14 Ves. Jun. 386. Mere continuance by a tenant in possession was not part performance of an oral agreement to grant a further lease: *Brennan v. Bolton* (1842), 2 Dr. & War. 349. Continued service as housekeeper was not part performance of an oral contract with the master to devise a life estate in land in return for such service: *Maddison v. Alderson* (1883), 8 App. Cas. 467. In *Noecker v. Noecker* (1917), 41 O.L.R. 296, it was held that a son's taking his mother to live with him might be referable to the relationship existing between them and was therefore not an unequivocal act of part performance of an alleged oral contract to leave her estate to him in return for such maintenance. *Coulter v. Elvin* (1911), 2 O.W.N. 678, and *Menzies v. Bartlet* (1918), 15 O.W.N. 8, also cited by Mr. Hughes, are cases of plainly equivocal or quite unconnected acts held to be insufficient, as part performance of the oral contracts alleged, to dispense with the written memorandum required by statute. But these cases differ widely from the case at bar, which, indeed, appears to me to be the model or type case of part performance sufficient to cure the absence of any written memorandum.

It is my opinion, after examining all the authorities to which counsel referred me, that the plaintiff is clearly entitled to prove and to rely on whatever oral contract with Lionel Cutten she alleges relating to and explaining her occupation of No. 63 Regal Road. The necessity for a written memorandum having been removed by part performance, all the circumstances must be considered, and the Statute of Frauds may be disregarded.

In 1919, Lionel Cutten resided on Huron Street in the City of Toronto, and Mr. Moncur and his wife lived in the house now known as No. 61 Regal Road. The land to the west of the Moncur house was vacant and is the land on which No. 63 Regal Road (in question in this action) now stands. During the autumn of that year the Irelands, husband and wife, had frequently discussed returning to Australia. One evening the three

sisters and their husbands were together in the library of the Moncur home, when the plans of the Irelands to return to Australia were again discussed. Mrs. Cutten said to Mrs. Ireland, "Why do you want to go back? There are just three of us left. Why cannot we all be together?"

Lionel Cutten said to Mrs. Ireland, "If you will stay here and not go back to Australia, I will buy that lot next door and build you a home, and it will be your home as long as you live, or as long as you want it."

The Irelands both agreed to stay in Toronto, if Lionel Cutten would do what he had offered. Apparently, it was settled that evening in the Moncur residence, when all six persons were together. At the time of this conversation, Mr. and Mrs. Ireland were staying as guests at the Moncur home.

The foregoing is the evidence of the plaintiff. I believe it to be the truth. It is substantially corroborated by the evidence of Mr. Ireland, whose evidence I also accept without reservation. He says that on the evening referred to by the plaintiff there had been an argument about their returning to Australia. Lionel Cutten said: "They're not going back to Australia. I'll build Ede a house on that lot she likes which is next door so she can live in it for as long as she wants to."

According to Ireland, the plaintiff said: "Well, if you'll do that, I'll agree to stay."

Ireland describes how Mrs. Cutten and Mr. Moncur walked out of the house to view the vacant lot and how when they returned, Mrs. Cutten remarked. "It is a beautiful site and should make a nice house for Edith."

Mr. Hughes insists that these two stories are contradictory. He points out that while Mrs. Ireland tells of a promise of "a home as long as you live, or as long as you want it", Mr. Ireland relates a promise that the plaintiff "can live in it for as long as she wants to." Even if Mr. Ireland had claimed to be stating the exact words used, I should be unable to see a contradiction in the two statements. Ireland, however, purported to relate only the substance of what took place and, therefore, cannot be held to exact words. It is necessary for me to find the precise terms of the promise and, in doing that, I think the words "as long as you want it" are significant. After considering them as carefully as I can, I have concluded that they indicate that it was not Lionel Cutten's intention to give an estate of freehold for

life to Mrs. Ireland. She was to have the right to occupy and enjoy for life, but only so long as she chose to use the house as her residence. That is to say, the plaintiff was not given the right, for example, to return to Australia and enjoy the rents and profits for life from No. 63 Regal Road. Mr. Hughes then says that such a promise is too uncertain to be enforced. Such provisions are commonly inserted in wills as where a testator leaves his widow the use and occupation of his home for life or for so long as she wishes to make it her residence. It seems to me that Lionel Cutten was promising the right to occupy the house he was to build to Mrs. Ireland, but making it a condition that she use it as her home, and not merely as a piece of real property from which profits were to be obtained. The subsequent conduct of the parties shows that this condition was not to be too harshly construed and that absence from the house, not intended to be permanent but for a temporary purpose, was not contrary to Lionel Cutten's intention. I think that, if there was consideration for such a promise, the Court will enforce it.

After this discussion at the Moncur home, Lionel Cutten purchased the vacant land, and work on the new house commenced without delay. The plaintiff, with the assistance of her sister Mrs. Cutten, chose the design for the house, and went over the actual plans with Lionel Cutten and her sister. I have said that the plaintiff and her husband took possession of the completed house on 4th March, 1920. I find that, in consideration of the promise made by Lionel Cutten, the purchase of land and erection of this house, the plaintiff did give up a *bona fide* intention of returning to Australia, and has ever since adopted a mode of living entirely different from that which would have been hers if she had not relied on that promise. This is good consideration, making an agreement that will be enforced: *Coles v. Pilkington* (1874), L.R. 19 Eq. 174. See also *Ungley v. Ungley* (1877), 5 Ch. D. 887.

Although taxes were not mentioned in the original agreement, the tax bills were sent to Lionel Cutten, who paid them to the end of 1936. The Irelands received assessment notices each year, in which Lionel Cutten was shown as owner, and sent these notices on to Lionel Cutten as the one interested in them. At no time did the plaintiff claim to be the owner of No. 63 Regal Road. Lionel Cutten, up to his death in 1938, paid the premiums on the fire insurance placed on the house, and, until about 1935,

the premiums on the insurance covering the contents as well. With the exception of repairs to a verandah in 1925, necessitated, apparently, by faulty construction on the part of the builder, the Irelands paid for all repairs and all decorating, inside and out, and this involved considerable outlay. In the early part of their occupancy, the Irelands had some fairly expensive landscaping done to the grounds.

In 1921, Lionel Cutten conveyed by deed the southerly ten feet of this land to one Leo Phelan. This was a ten-foot strip adjoining the northerly limit of Davenport Road. The purpose of the conveyance was apparently to reduce the total taxes payable on the land. The transaction was carried out by Lionel Cutten with the knowledge and agreement of the plaintiff.

Commencing about the year 1922, the plaintiff rented three of the upstairs rooms in the house to tenants, receiving and retaining the rent from such tenants. From about May or June, 1932, shortly before the death of Mrs. Cutten, to some time in 1935, the plaintiff and her husband, at the request of Lionel Cutten, took up temporary residence in his Forest Hill home. The stay there was not continuous and not intended to be permanent. While absent from No. 63 Regal Road, the plaintiff rented the remainder of that house with Lionel Cutten's knowledge, and received and retained the rent. In 1935, at the request again of Lionel Cutten, the Irelands returned to "their home" on Regal Road.

The same caretaker has been employed in connection with the Regal Road house since the plaintiff and her husband took possession, and he was engaged and has always been paid by the Irelands.

Lionel Cutten appears to have been a kindly and generous man. He frequently made gifts, of money as well as of other things, to the plaintiff, his last gift being an electric refrigerator in 1937. A number of cheques are in evidence indicating that Mrs. Cutten also gave financial assistance to the plaintiff.

I can see nothing in these circumstances that I have related in any way inconsistent with the agreement made in the autumn of 1919 between the plaintiff and Lionel Cutten. Mr. Hughes argues that the plaintiff was never more than a tenant at will. I have found that she is in possession under an enforceable agreement, made for good consideration, whereby, so long as she wishes to make No. 63 Regal Road her home, she is en-

titled to remain in occupation. Apart from this agreement, the very circumstances I have set out are, in my opinion, inconsistent with a tenancy at will. It appears in evidence that the house is by far the most costly of any on Regal Road, "Twice the size and twice the price of any house on the street", one witness puts it. It is not suggested by any evidence that the land was purchased, or the house built, for any purpose other than to serve as a residence for the plaintiff and her husband. Even a tenancy at will rests on agreement. It is to me completely improbable that such a course of dealing as I have set out, involving the expenditure of so much money and the adoption of an apparently permanent way of life, could have been entered into merely as the basis of a tenancy at will.

In 1922, Lionel Cutten was living in a new house he had purchased situate in the Village of Forest Hill. The Irelands from time to time called there. One evening, when they were in one of the bedrooms in that house, Lionel Cutten remarked that, although he had built a house on Regal Road, he had not received any rent for it. The exact words used do not clearly appear from the evidence, but I accept the evidence of the plaintiff and her husband that it was not regarded as a serious request for rent. Treating it as a joke, Ireland took a one dollar bill from his pocket and gave it to Cutten, saying, "There's your rent". Cutten accepted the dollar and kept it. The defendant produces a cheque and a letter, both in the plaintiff's handwriting, both dated 4th March, 1927, the cheque payable to Annie R. Cutten and the letter being in the following words: "Toronto, Mar. 4th, 1927, Dear Annie: Inclosed find check for seven dollars, rent to date March 4th, 1927, for house 63 Regal Road. Yours sincerely, Edith Ireland."

The defendant, who is the sole executor of his mother's will, states he found the letter and the cheque, which had never been cashed or endorsed, among her papers after her death. The plaintiff has no memory whatever of writing or sending the letter or cheque, and, apparently, no memory of any discussion about rent for No. 63 Regal Road other than the one I have mentioned as taking place in 1922. The cheque was drawn on an account in which there were funds sufficient to meet it on its date, and it is undoubtedly the plaintiff's genuine cheque. It is to be observed that 4th March, 1927, is exactly seven years after the date when the plaintiff took possession of No. 63 Regal Road.

I am unable to see that the payment of one dollar in 1922, or the letter and cheque of 4th March, 1927, affects the original agreement which I have found was made in 1919. The chief importance of these two things is, of course, to throw doubt on the genuineness of the oral agreement upon which the plaintiff relies. So far as my mind goes, I am unable to give any effect to them which weakens in any degree my opinion that a valid bargain was made in 1919. The payment in 1922 I accept as not being more than a joke between the plaintiff and Lionel Cutten, or perhaps a half-serious reminder that Lionel Cutten was still the owner of No. 63 Regal Road. Since the plaintiff wrote the letter and gave the cheque of 4th March, 1927, the burden of explaining them rests on her and she, quite honestly, I think, says that she can tell us nothing about them. If we suppose that, after the original agreement, the plaintiff agreed to pay one dollar each year as rent, and it is mere supposition, this would not, it seems to me, alter the nature of the plaintiff's occupation of the premises in question. One dollar a year for such premises could only be an acknowledgment that Lionel Cutten was in fact the owner, and this the plaintiff at no time denied. If we begin with a valid agreement, such as I have found to have been made in 1919, then the letter and cheque do not seem to alter the substance of that agreement in any material particular.

The defendant, Arthur Cutten, tells of a payment of one dollar "in lieu of rent" made in his presence to his father by Ernest Ireland, who asked for and got a receipt. He says the payment was made some time between 1920 and 1930, and, because of the letter and cheque dated in March, 1927, argues that the payment he witnessed must have been made between March, 1927, and 1930. Arthur Cutten was born in 1905. In 1922, he was 16 or 17 years of age. He impressed me as being a completely untrustworthy witness whose testimony is quite worthless. Counsel were informed of my opinion of the evidence of this witness and the case was argued on the basis of that opinion. If Arthur Cutten ever knew of a payment of one dollar, it was the payment made in 1922 of which perhaps he heard at the time. On discovery he described the payment as a jocular incident, a description resembling the description given the 1922 payment by the plaintiff and her husband. Arthur Cutten gave a good deal of evidence relating to other aspects of this case. Wherever it conflicts with the evidence of any other witness, I reject it.

The remaining facts of this case, so far as they appear to me to be of any importance, may be briefly stated. Mrs. Lionel Cutten died on 16th October, 1932. Important only as showing the affection existing between the sisters is the fact that Mrs. Cutten's will provided for payment of \$100.00 per month to the plaintiff for life. Mrs. Moncur died on 6th January, 1933. From about the death of Mrs. Cutten till some time in 1935, the Irelands, at Lionel Cutten's request, resided at the Cutten house in Forest Hill. It is not suggested that there was anything permanent about the stay, which was not continuous and was broken on two occasions at least by their return to the house on Regal Road. While absent from No. 63 Regal Road, the plaintiff received all the rents from the tenants to whom she let the house. In 1937, the plaintiff was informed by Arthur Cutten that thereafter she should pay the taxes on No. 63 Regal Road and Mr. Ireland received the 1937 and 1938 tax bills from the accountant of the Cutten firm, where Ireland was employed. The Irelands did pay the taxes in 1937 and 1938.

In December, 1936, on instructions from Arthur Cutten, a real estate agent placed a "For Sale" sign on the lawn to the west of the Regal Road house. It appears that in November of that year, this agent had valued the property for Arthur Cutten by inspecting it, so far as the evidence appears, from the outside. In January, 1937, a second real estate agent, and in May a third, also placed a "For Sale" sign on the lawn. Except for the fact that the plaintiff noticed the signs after they were so placed, no communication with her concerning her occupation of the premises, before the death of Lionel Cutten on 1st August, 1938, appears from the evidence to have taken place. In March, 1938, Lionel Cutten executed a power of attorney in favour of his son Arthur, the defendant, but I was not informed of the extent of the power.

In September, 1938, the defendant telephoned the plaintiff to the effect that he intended to proceed with the sale of the house. In October, 1938, a representative of a trust company employed by Arthur Cutten went through the house for the purpose of valuing it, and on that occasion was informed by Mrs. Ireland that she understood the house was for sale. In December, 1938, two other real estate men went through the house. In January, 1939, there were some telephone conversations between the plaintiff and representatives of the trust company in which

the prospect of sale and the advisability of renting the premises were discussed.

These facts can be of importance only if I am wrong in my finding that, in 1919, a valid and enforceable agreement was entered into between the plaintiff and Lionel Cutten; otherwise, it seems to me, they cannot affect the outcome of the action. They may have to be considered later in this judgment.

In January, 1939, the defendant, as executor of Lionel Cutten, agreed to sell the lands and premises known as No. 63 Regal Road for the price of \$12,500.00, the transaction to be closed 31st January, 1939. After some correspondence, the writ of summons in this action was issued on 6th February, 1939, and a certificate of *lis pendens* registered against the title on behalf of the plaintiff. The principal claim in the action is for "a declaration that the plaintiff is entitled to occupy the said lands and premises known as No. 63 Regal Road, rent free, for the period of her natural life."

One further objection made on behalf of the defendant must be considered. He says that, since this is an action against an executor, The Evidence Act, R.S.O. 1937, ch. 119, requires that the plaintiff's evidence be corroborated by some other material evidence. So far as I was able to judge, this objection was seriously taken and maintained to the close of the argument. I think that there is ample corroborative evidence, not only in the testimony of Ernest Ireland, which I accept, but also in the very fact of possession by the plaintiff of the lands. Apart from this, however, there is the evidence of two quite independent witnesses.

Frank Terry is a department manager in the business with which Lionel Cutten was associated. He has been with that business since 1920, and knew Cutten intimately from 1924. For a number of years, he lunched daily with Cutten, and he and his wife frequently visited the Cuttens at their Forest Hill home. He tells how, one evening in 1925, when he and his wife were with Lionel and his wife at the Cutten home, Mrs. Cutten, in her husband's presence suggested that she show the Terrys "the house she had built for Mrs. Ireland", appearing to take some pride in the plans. Following this suggestion, Terry, Cutten and their wives went to the Regal Road house where they met the Irelands and were shown over the whole house, spending the remainder of that evening there. On another occasion, in 1932,

not long after Mrs. Cutten's death, Terry was at lunch with Cutten, and the conversation came round to Cutten's family affairs. Lionel remarked what a clever will his late wife had made and observed that Mrs. Ireland would be looked after as long as she lived, "having a legacy of \$100.00 a month and her home at 63 Regal Road". This evidence, which I have no reason at all to doubt, is strongly corroborative, it seems to me, of the plaintiff's evidence, and I accept it as true.

Eric Charles Winnett, who has been tenant of three rooms on the second floor of the Regal Road house since 24th May, 1925, gave evidence. He made all arrangements with the plaintiff to whom he has always paid the monthly rent, and, so far as his occupancy goes, had had no dealings with anyone else. He first met Lionel Cutten one evening in June, 1925, when Cutten and his wife visited the Irelands. He tells how, when Mrs. Cutten and Mrs. Ireland went into the house, he and Cutten remained on the verandah in general conversation. Cutten told him that the site had formerly been picnic grounds and mentioned that he had built the house for Mrs. Ireland to live in during her life, so that "the three girls might be together". Cutten said that he felt that, if Mrs. Ireland returned to Australia, she might stay there. Like Frank Terry, this witness impressed me as a truthful witness whose evidence I have no reason to disbelieve. It affords, I think, direct corroboration of the plaintiff's evidence.

If I am right in my interpretation of the evidence and have correctly applied the law, the plaintiff is clearly entitled to the declaration she claims. Because of the possibility of error, it is my duty to deal with an alternative claim by the plaintiff, which comes in this way. The defendant, who as executor stands in Lionel Cutten's shoes, denies the making of the agreement alleged, and, further, pleads the absence of any written memorandum and of any effective corroboration, and says that the plaintiff was never anything more than a tenant at will. Anticipating some such defence, the plaintiff claims alternatively a declaration that she has acquired a title in fee simple to No. 63 Regal Road by virtue of The Limitations Act, R.S.O. 1937, ch. 118.

By virtue of secs. 4 and 15 of The Limitations Act, the title of the owner of any land which is in the possession of another is extinguished at the expiration of ten years from the date when his right to make an entry first accrued. By virtue of sec. 5(7),

where the person in possession is a tenant at will, the right of entry is deemed to have accrued at the end of one year from the date when such tenancy began, or from the date when such tenancy actually determined, whichever is the earlier date. It is clear, therefore, that, without anything more, if the plaintiff went into possession of No. 63 Regal Road on 4th March, 1920, as tenant at will of Lionel Cutten, the ten-year period began to run on 4th March, 1921. The running of the statute may be interrupted in various ways, but if it is not interrupted for a period of eleven years from the commencement of a tenancy at will, the title of the owner is extinguished in favour of the tenant, who then becomes owner in fee simple. The leading case is *Day v. Day* (1871), L.R. 3 P.C. 751, and I quote two passages from the Privy Council judgment in that case, at page 761: "When the Statute has once begun to run it would seem on principle that it could not cease to run unless the real owner, whom the Statute assumes to be dispossessed of the property, shall have been restored to the possession. He may be so restored either by entering on the actual possession of the property, or by receiving rent from the person in the occupation, or by making a new lease to such person, which is accepted by him; and it is not material whether it is a lease for a term of years, from year to year, or at will."

And, at page 763, "The language and policy of the Statute require that to constitute this new *terminus a quo* the agreement for a new tenancy should be made by the parties with a knowledge of the determination of the former tenancy, and with an intention to create a fresh tenancy at will."

The *Day* case is authority for the proposition that mere determination of a tenancy at will is not sufficient to interrupt or stop the running of the statute. There must be evidence of a new tenancy. Two other sections of the Act should be noticed—sec. 8, which provides that no person shall be deemed to have been in possession of any land merely by reason of having made an entry thereon, and sec. 9, which provides that a right of entry cannot be kept alive merely by making a continual claim on the land. The authorities also make it clear that a tenancy at will is determined by any act of the owner done with the knowledge of the tenant inconsistent with the continuance of such tenancy: *Turner v. Doe d. Bennett* (1842), 9 M. & W. 643; *Doe d. Baker v. Coombes* (1850), 9 C.B. 714.

Turning to the facts of this case, I think I should have to hold that the payment of one dollar to Lionel Cutten in 1922 gave a new starting-point to the statute: *Day v. Day* (1871), L.R. 3 P.C. 751; sec. 13 of the Act. Whether or not it was a joke, it was called rent and Lionel kept it.

The next incident that could affect the running of the statute was the cheque and letter of 4th March, 1927. The cheque was never indorsed, nor paid, and nothing passed to Lionel Cutten thereby. It was not, I think, a payment of rent within the meaning of sec. 13. In my opinion the letter was not an acknowledgment within that section either. The essentials of an acknowledgment are discussed in *Armour on Real Property*, 2nd ed., at page 502 *et seq.* The acknowledgment must be made to the owner or his agent. Mr. Hughes argues that Mrs. Cutten was Lionel Cutten's agent for this purpose. With respect, I can find no evidence whatever that Lionel Cutten ever constituted his wife his agent for any purpose connected with No. 63 Regal Road and, more particularly, there is no evidence that he ever heard of the letter or cheque. It is true that it was perhaps chiefly because of his wife that Lionel purchased the land and built the house and, knowing this, she may have spoken of it as a house that she built for her sister; but I think the affectionate relations of husband and wife are not to be confused with agency. I am unable to find that the running of the statute, if it were running, could have been interrupted by this cheque or this letter.

If we suppose the payment of one dollar to have been made on the last day of 1922, the eleven-year period would have expired on 31st December, 1933, and I can find nothing in that period to interrupt the running of the statute. On the assumption, with which of course I disagree, that the plaintiff commenced her occupation as a tenant at will, she would have a good title in fee simple at least by 1st January, 1934, and nothing short of a reconveyance after that date could affect her title: *Doe d. Perry et al. v. Henderson* (1847), 3 U.C.Q.B. 486; sec. 15 of the Act. Even if 4th March, 1927, was constituted a new starting-point, I think that nothing in the next eleven years occurred to interrupt the running of the statute. There was no payment, taxes not being rent: *Finch v. Gilray* (1889), 16 O.A.R. 484. The placing of "For Sale" signs on the lawn may have been sufficient to terminate the tenancy at will, but, if so, there is clearly no evidence that there was ever a new agreement for a fresh tenancy at will.

Arthur Cutten certainly does not pretend ever to have agreed to any tenancy, and the placing of the signs was his doing. At most they constituted a mere entry within the provisions of sec. 8 of the Act. It would follow that, before the death of Lionel Cutten in August, 1938, eleven years had run from 4th March, 1927, and the plaintiff, if originally a mere tenant at will, had acquired a good title in fee simple.

Generally, with regard to the nature of the plaintiff's occupation as a tenant at will, the payment of taxes and insurance by Lionel Cutten was in no way inconsistent with such a tenancy: *Noble v. Noble* (1912), 27 O.L.R. 342; the assessment of Lionel Cutten as owner, and Lionel's friendly visits to the property, equally gave no new starting-point to the statute as being inconsistent with the original tenancy at will: *McCowan et al. v. Armstrong* (1902), 3 O.L.R. 100.

It is my opinion, therefore, if the defendant is correct in saying that the plaintiff occupied No. 63 Regal Road as tenant at will, that Lionel Cutten's title has been extinguished by virtue of The Limitations Act, and that the plaintiff is the owner in fee simple.

The defendant's counsel, however, argues that in no event can the plaintiff be entitled in fee. The principle he relies on appears most plainly in *Board v. Board* (1873), L.R. 9 Q.B. 48. In that case, a tenant by the curtesy, having nothing to devise, nevertheless by his will purported to devise a life estate to his daughter, Rebecca, with remainder to his grandson William. Upon his death, Rebecca went into possession and the true owner stood by and allowed his title to be barred by her possession. By her conduct in paying certain annuities charged against the land by the invalid will, Rebecca clearly showed that she took possession thereunder. After Rebecca's death, it was contended that the will being void, William, the grandson, took nothing thereunder, and that Rebecca had acquired, by possession, a title in fee simple for her own benefit. It was held that as against the grandson, William, entitled in remainder under the will, Rebecca had taken only a life estate. Blackburn J., at page 53, says: "My brother Martin, in *Anstee v. Nelms* (1856), 1 H. & N. 232, says that the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter and then say that such possession was unlawful, so as to give to his heir a right against a remainderman. That

seems directly in point. It is good sense and good law. All that we have to decide here is that Rebecca, having entered under the will, William, the remainderman under the same will, has a right to say that she and all those claiming through her are estopped from denying that the will was valid."

The cases, *Re Defoe* (1882), 2 O.R. 623, and *Bartels v. Bartels* (1877), 42 U.C.Q.B. 22, so far as they are relevant, add nothing new to the statement of Blackburn J., in the *Board* case. I think that the position of the defendant here in no way resembles the position of the grandson in that case. If it is borne in mind that the plaintiff claims a title in fee simple only if the defendant succeeds in destroying the validity of the contract under which she claims to have entered, the distinction between the case at bar and the *Board* case becomes apparent. It is one thing to say that Mrs. Ireland cannot deny the validity of the agreement under which she took possession so as to bar the claim of a person who would be entitled in remainder if the agreement were in truth valid: that is the *Board* case. It is a quite different thing to say that the defendant may by his conduct before trial deny the existence and validity of any such agreement and, when he has succeeded in having the Court declare the agreement invalid, or void, or non-existent, that he may then claim as against the plaintiff that he must be given all the rights to which he would have been entitled if he himself had not successfully shown that the alleged agreement in fact conferred no right: that is the defendant's contention. In effect, the defendant would be saying to the plaintiff, "You are estopped as against me from denying the validity of an agreement which in this very action I have succeeded in showing to be invalid." I should require the strongest authority to compel me to accede to such a proposition, which is not supported by any case cited by counsel before me.

The plaintiff, in the view I take of the facts and law, is entitled to a declaration that she is entitled to occupy the lands and premises known as No. 63 Regal Road, Toronto, rent free for the period of her natural life. This declaration will no doubt serve every purpose, and the injunction asked for is hardly necessary and will not be granted. The counterclaim, for possession, rent and damages, is dismissed. The defendant must pay the plaintiff's costs both of the action and the counterclaim.

Judgment for the plaintiff with costs.

[COURT OF APPEAL.]

Christie et al. v. Edwards.

Companies—Voluntary winding up—Class action by shareholders for declaration that company not wound up and for accounting from liquidator of a sum retained for specified purposes—Plaintiffs had subscribed to resolution for winding up and had approved report of the liquidator—Mandatory operation of sec. 208 of The Companies Act, R.S.O. 1937, ch. 251—Whether plaintiffs entitled to relief in action as framed.

In this action the plaintiffs sued as a class on behalf of themselves and all other shareholders of a limited company for a declaration that the limited company had not been fully wound up and dissolved and for an accounting from the liquidator of the company with respect to a sum of money retained by the liquidator for certain specified purposes.

Held that, although the defendant liquidator should be made to account with reference to the sum of money retained by him for the specified purposes, the plaintiffs as a class can not maintain this action since the company was fully wound up and dissolved on March the 10th, 1933, by virtue of the operation of sec. 208 of The Companies Act, R.S.O. 1937, ch. 251. The plaintiffs had subscribed to the resolution for the voluntary winding up of the company and they approved the report of the liquidator. Hence sec. 208(2) applied, and this section is mandatory, unless fraud could be proved, and no fraud was alleged.

AN appeal by the defendant from the judgment of Roach J., reported in [1939] O.R. 48, in favour of the plaintiffs. The facts are fully stated in the reasons for judgment of Roach J.

September 11th and 12th, 1939. The appeal was heard by RIDDELL, McTAGUE and GILLANDERS JJ.A.

D. L. McCarthy, K.C., and *A. W. R. Sinclair*, K.C., for the defendant, appellant.

G. W. Mason, K.C., and *C. B. Henderson*, K.C., for the plaintiffs, respondents.

September 28, 1939. The judgment of the Court was delivered by McTAGUE J.A.:—This is an appeal by the defendant from a judgment of the Honourable Mr. Justice Roach dated the 23rd day of December, 1938, after trial at the Toronto Non-Jury Sittings.

The plaintiffs were all shareholders in an Ontario company known as Erwik Estates Limited. They sue in a class action on behalf of themselves and all other shareholders of the company, except the defendant. The action as framed is for a declaration that Erwik Estates Limited has not been fully wound up and dissolved, and for certain other consequential relief, including an accounting from the defendant of certain Province of Ontario bonds of value in excess of \$25,000.00.

By the judgment appealed from, it was declared that Erwik Estates Limited was not fully wound up or dissolved. The defendant was removed as liquidator, and a reference was directed to the Master to appoint a new liquidator and conduct an accounting between the defendant and the new liquidator with respect to the \$25,000.00 Province of Ontario bonds. As an independent part of the accounting, the defendant was ordered to tax his costs, charges, expenses and remuneration before the Taxing Officer at Toronto, the amount so ascertained to be credited against whatever amount the Master found should be handed over by the defendant to the new liquidator.

The important facts appear to be as follows. On the 2nd day of May, 1932, at a meeting of all the shareholders, including the plaintiffs, a resolution was unanimously passed that Erwik Estates Limited be wound up voluntarily under the provisions of The Companies Act (Ontario), R.S.O. 1937, ch. 251, Part XIV, and a further resolution was passed appointing the defendant Edwards liquidator of the company. At a later meeting, on the 6th day of December, 1932, at which the plaintiffs were present or else signified their consent to what transpired by signing the minutes, the liquidator presented a statement showing the assets which came into his hands on the 2nd day of May, 1932, and statements showing the disposition thereof. Then follows a minute out of which this litigation arises: "It was explained that the distribution of the assets had been effected partly in cash and partly in specie, as shown by the separate accounts prepared for each shareholder: and that to the extent that the distributions had been made in specie due account had been taken of the accrued interest: and that to ensure a fair and equitable distribution regard was had to both the cost price and also the market price of each security as determined by independent and competent opinion: *and that there had been reserved for taxation, legal charges and other expenses, the sum of \$25,000 to be used as the liquidator with the advice of Messrs. Laughton & Edmonds may determine.*" At the meeting, a resolution was passed, adopting the report of the liquidator and approving the plan of distribution. On the 9th day of December, 1932, the liquidator notified the Provincial Secretary pursuant to section 208 of The Companies Act of the action of shareholders at the meetings of May 2nd and December 6th, and returned the original letters patent and supplementary

letters patent which had changed the name "Christie Brown & Co. Ltd." to "Erwik Estates Limited." On the 10th day of December, 1932, the Assistant Provincial Secretary acknowledged the liquidator's notice, and advised pursuant to the section that, at the expiration of three months from that date, the company would *ipso facto* be dissolved.

Mr. Edwards instructed the National Trust Company to dispose of some \$25,000 Province of Ontario bonds which they were holding for Erwik Estates Limited. This was done, and, since the bonds were selling at a premium, he actually received \$28,037.21 pursuant to the explanation contained in the minutes of the meeting of December 6, 1932. Apparently nothing was done about the matter until July 9, 1935, when the plaintiffs through their solicitors made demand for an accounting of the sum of \$25,000. This demand was reiterated in letters of July 20, 1935, and July 31, 1935. It is significant that the defendant did not see fit to reply to any of these demands, although he now takes the position that whatever remains unexpended for certain tax claims and other expenses belongs to him personally as liquidator's fee. The plaintiffs then launched a motion before the Honourable Chief Justice Rose in Weekly Court on the 19th day of June, 1936, for substantially the same relief as is sought here. The motion was dismissed without prejudice to any action which the plaintiffs might bring to enforce their rights. This action was later commenced by writ issued the 30th day of April, 1938.

The main relief sought being for a declaration that the company is not fully wound up or dissolved, it devolves upon the Court to consider the effect of sec. 208 of the Ontario Companies Act, R.S.O. 1937, ch. 251, which reads as follows:

"208.—(1) Where the affairs of the corporation have been fully wound up, the liquidator shall make up an account showing the manner in which the winding up has been conducted, and the property of the corporation disposed of, and thereupon shall call a general meeting of the shareholders or members of the corporation for the purpose of having the account laid before them and hearing any explanation that may be given by the liquidator, and the meeting shall be called in the manner provided by the by-laws for calling general meetings.

(2) The liquidator shall make a return to the Provincial Secretary of such meeting having been held, and of the date at which the same was held, and the return shall be filed in the

office of the Provincial Secretary, and on the expiration of three months from the date of the filing the corporation shall *ipso facto* be dissolved."

The learned trial Judge, for whose opinion I have the highest admiration and regard, took the view that the operation of the second part of the section could not take place unless as a condition precedent the company was in fact fully wound up, and that in this case there was still some \$25,000 to be accounted for by the liquidator. With this view I am not in accord, as applied to the circumstances here. As against these plaintiffs, it seems to me that the company was fully wound up and dissolved on the 10th day of March, 1933, by virtue of the operation of the section. They subscribed to the resolution for voluntary winding up on the 2nd day of May, 1932, and they approved the report of the liquidator on the 6th day of December, 1932. The section is mandatory, and, in my opinion, acts as a complete bar, unless the person seeking relief against its operation can prove fraud. Furthermore, he must prove fraud upon himself before he can obtain relief. He cannot get relief under the rights of persons not parties to the action. There is no allegation of fraud here, and no attempt is made to prove fraud in evidence. While I think it is the view of the Court that in a properly framed action the defendant should be made to account for the moneys reserved, there is no question of fraud such as would nullify the effect of subsection 2 of section 208.

The matters here involved were long ago considered in connection with similar sections in the old English Companies Act. In *In re Pinto Silver Mining Co.* (1877), 8 Ch. D. 273, it was held that there was no jurisdiction in the Courts to wind up a company which had been dissolved under The Companies Act itself in voluntary winding up proceedings unless the dissolution could be impeached on the ground of fraud. This case was followed in *In re London & Caledonian Marine Insurance Co.* (1879), 11 Ch. D. 140. It is noteworthy also that the construction to be put on the words "as soon as the affairs of the company are fully wound up" was considered, and it was held that they could not be taken as constituting a condition precedent, the effect given to similar words by the learned trial Judge here. The effect of sec. 208, subsection 2, is such that the Court cannot go behind it, unless the plaintiff can establish that the dissolution was obtained by fraud.

The learned trial Judge apparently thought that if the plaintiffs could be classed as contributories, he had jurisdiction under section 193(b) reading as follows: "A corporation may be wound up by order of the Court where proceedings have been begun to wind up voluntarily and it appears to the Court that it is in the interest of contributories and creditors that they should be continued under the supervision of the Court." In his reasons he refers to *Re Macdonald & The Noxon Brothers Mfg. Co. (Limited)* (1889), 16 O.R. 368, where it was held that a paid up shareholder was a contributory within the meaning of section 5 of the old Ontario Winding Up Act, R.S.O. 1887, c. 183. In view of the wording of the sections in Part XIV of the present Act, I doubt that to the word "shareholder" can be given such an extended meaning. However, it is unnecessary to decide the question because, whether the plaintiffs can be called shareholders or contributories, they are persons who not only acquiesced in the voluntary winding up, but took an active part in it, and cannot now be heard in an action to set aside what were their own acts. Further reference to *In re Pinto Silver Mining Co. (supra)* on this point.

While it is the view of the Court that the defendant should be made to account, we feel we cannot give this relief in the action as framed. If we are right in our views, then there is no such company as Erwik Estates Limited, no shareholders thereof, and the liquidator as such is *functus officio*. While technical justice is to be avoided where possible, we do not think that the application of Rule 183 can go so far as to justify us reconstituting the whole action, particularly when it is a matter of conjecture as to how far the defendant would be prejudiced by such action at this stage of the proceedings.

The appeal should be allowed with costs here and below, but without prejudice to any further proceedings the plaintiffs may be advised to take.

Appeal allowed with costs.

[COURT OF APPEAL.]

International Railway Company v. Niagara Parks Commission

Interest—Contract for construction and operation of an electric railway company—Franchise—Return of plant and equipment on expiration of franchise—Compensation for plant—Arbitration—Award—Claim for interest on amount of award—Emanation of Crown—Petition of right.

The plaintiff brought this action to recover interest on moneys awarded to the plaintiff in arbitration proceedings as finally determined by the Privy Council (see [1937] O.R. 607) and the plaintiff based its claim on the general rule of equity that if a purchaser of land is in possession of an estate receiving the rents, the purchase money retained by him will carry interest to be paid by him to the vendor.

Held that, the action should be dismissed for the following reasons:

- (1) The agreement between the parties was an agreement by which the defendant granted to the plaintiff a franchise for a limited period coupled with an obligation on the part of the plaintiff at the end of the period to accept compensation to be ascertained by arbitration for whatever investment the plaintiff had made pursuant to the franchise originally granted it. At the end of the period the plaintiff had nothing to sell and the only right it had was a right to compensation for the loss of its investment, and the agreement definitely obligated the plaintiff to give up possession of its plant and equipment before compensation was ascertained or paid. The relationship between the parties was not that of vendor and purchaser, and the plaintiff, being specifically disentitled to possession under the contract, cannot claim interest in lieu thereof on the equitable principle.
- (2) The defendant is an emanation of the Crown and can be proceeded against only by petition of right. There is nothing in the statutes creating the defendant commission which takes away its immunity to be proceeded against except by petition of right. The mere fact that the defendant is defined as a corporation in the statute creating the defendant and that by The Interpretation Act, R.S.O. 1937, ch. 1, a corporation may sue or be sued is not strong enough to destroy the immunity of the defendant as an emanation of the Crown.

AN action to recover interest.

The action was tried by J. G. KELLY J., without a jury, at Toronto.

J. W. Pickup, K.C., and J. W. G. Thompson, for the plaintiff.

A. G. Slaght, K.C., and R. I. Ferguson, K.C., for the defendant.

July 24th, 1939. J. G. KELLY J.:—This action is based on a contract made between the predecessors of the parties, dated 4th December, 1891. When the contract otherwise came to an end on 1st September, 1932, the defendant owed the plaintiff thereunder a large sum of money, and, pursuant to the terms of the contract, arbitration proceedings were had to determine the amount. On 29th May, 1935, by a majority award, the arbitrators fixed the amount at \$179,104.00. This amount was reduced by the unanimous judgment of the Court of Appeal but, by the decision of the Privy Council given 23rd April, 1937, was in-

creased to \$1,057,436.00. This last amount has been paid together with interest from the dates of the respective awards to the date of payment.

The nature of the plaintiff's claim may be stated as follows: The contract was simply a purchase and sale agreement respecting the plaintiff's lands, and the sum awarded in the arbitration proceedings was purchase money. In equity, the purchase price of land bears interest, until paid, from the date when under the contract the purchaser takes possession, or may safely do so. The defendant could have taken possession on 1st September, 1932, and the award was paid on 3rd June, 1937. The plaintiff is therefore entitled to interest at 5 per cent. per annum on the amount of the award from 1st September, 1932, to 3rd June, 1937. After credit is given for such interest as was paid, the net amount of the claim in this action is \$227,538.22.

It is to be observed that the amount claimed for interest is not claimed by way of damages, and that the claim is not based on secs. 33 to 35 of The Judicature Act, R.S.O. 1937, ch. 100, nor upon any other statute. The plaintiff relies solely upon the principle or rule of equity which gives to the vendor of land interest on unpaid purchase money from the date when the purchaser takes, or may safely take, possession under the agreement. To avoid confusion, I ignore for the present a secondary claim for interest on the main amount claimed from 3rd June, 1937, to the date of judgment, such secondary claim resting, of course, on a different basis.

Two main defences to this action are set up.

First. The contract is not one for the purchase and sale of land, and does not itself, expressly or by implication, provide for the payment of interest.

Second. The defendant is an emanation from the Crown and a servant of the Crown. The contract sued on was made on the Crown's behalf respecting property of the Crown. The defendant is, therefore, not liable to be sued on such a contract, but the plaintiff must seek his remedy, if any, by petition of right.

Before dealing with these defences, it is advisable, I think, to consider briefly the application and the limitations of the equitable rule on which the plaintiff relies. The rule is stated in the headnote to *Birch v. Joy* (1852), 3 H.L.C. 565:

"It is a general rule of equity, that if a purchaser is in possession of an estate, receiving the rents, he is liable to pay the

purchase money, and that the purchase money being retained by him will carry interest to be paid by him to the seller."

The rule has been applied to compulsory purchases of land under certain statutes, interest being payable from the date of taking possession, or from the date when the purchaser might prudently have taken possession, and not from the date of the arbitrators' award fixing the amount of compensation: *Rhys v. Dare Valley Railway Co.* (1874), L.R. 19 Eq. 93; *In re Pigott and G.W. Ry. Co.* (1881), 18 Ch. D. 146. In *Inglewood Pulp and Paper Co. Ltd. v. N.B. Electric Power Commission*, [1928] A.C. 492, on appeal from an award by arbitrators, the Privy Council decided that the principle applied to any statutory expropriation of land, unless the statute clearly shows a contrary intention. In our own Court, see *Re Davies and James Bay R.W. Co.* (1910), 20 O.L.R. 534; *In re Cavanagh and the Canada Atlantic Ry. Co.* (1907), 14 O.L.R. 523.

The limitations to the application of the rule must be noticed. The House of Lords refused to apply it to the compulsory taking of goods: *Swift & Company v. Board of Trade*, [1925] A.C. 520; so, also, the Supreme Court of Canada: *The Canadian Drug Co. v. The Board of The Lieutenant-Governor-in-Council*, [1925] S.C.R. 23. In a case where a ship had been requisitioned by the Canadian Government, it was sought to apply the principle so that interest would run on the compensation awarded, it being argued that the Government had the profits from the ship while in possession; but the Supreme Court of Canada disallowed the interest, holding that the right to interest does not depend on the income-earning capacity of the property requisitioned: *The King v. MacKay*, [1930] S.C.R. 130. At page 132 of the report, Anglin C.J.C., uses this language:

"Interest is allowed on the purchase money of land which is the subject of a sale; or on the value of land which is the subject of expropriation under certain statutes—but that is upon the ground of implied contract which is deemed to arise on the giving of 'notice to treat.' "

In re Richard and The Great Western Ry. Co., [1905] 1 K.B. 68 seems to make it clear that the application of the principle is confined to transfers of land and will not be extended by analogy to other kinds of transactions. Under English statutes, an owner of minerals lying under or near a railway line must give to the railway company notice of his intention to work the mine. If

the company gives notice of its willingness to pay compensation, the owner of the minerals may not thereafter mine them. The amount of compensation is then fixed in arbitration proceedings. In the case cited, the Court refused to allow interest from the date of the company's notice on the amount of compensation awarded, proceeding on the simple ground that there had been no transfer of any land in the course of the transaction; the minerals remained still the property of the owner who gave the notice, although he could do nothing with them.

A number of other cases were cited and discussed during the argument. With the possible exception of two, which may be called the Toronto Railway cases (reported, *Toronto City Corporation v. Toronto Ry. Corporation*, [1925] A.C. 117 and (1926), 59 O.L.R. 73), they do not, in my opinion, add anything to the rules laid down in the cases cited, affecting the application of the equitable principle relied on by the plaintiff. Before discussing the Toronto Railway cases, I propose to consider the contract between the parties in this case to determine whether it is in truth an agreement for the sale of the land of the plaintiff to the defendant.

I have said that the contract was made originally between the predecessors of the parties, but, as nothing turns upon that, the contract may be discussed as if one between the plaintiff and defendant from its date. The contract has been considered and authoritatively described in the Privy Council: *International Railway Company v. The Niagara Parks Commission*, [1937] O.R. 607. The description by Lord Macmillan in that case enables me to dispense with a great deal of detail.

By the contract, dated 4th December, 1891, the Commission gave permission and the Company undertook to construct and equip a first-class railway over the lands of the Commission, according to plans and specifications, and on a location approved by the Commission. The Company undertook to acquire and hold under the Commission any elevators and railways then existing on the lands. Subject to a right of renewal given to the Company which was never exercised, the contract without anything more came to an end 1st September, 1932. Certain obligations and payments were imposed and required during the life of the contract, but these have no bearing, it seems to me, on the question whether the contract was one for the purchase and sale of lands. Under the contract, the Company undertook to acquire any lands necessary for the railway and not included in the Commission's

holdings; at the termination of the contract, the Company was the owner in fee of lands so acquired to the value of \$30,450.00 which passed to the Commission.

Because, after the contract was executed, no further agreement or notice was required, it will make for a clearer view of its nature if the years intervening between the beginning and end of the contract are disregarded. All that had occurred in those years had ceased to be of any importance, so far as this case is concerned, on 1st September, 1932. Looked at in this way, what was the contract?

It seems to me that it was simply a contract between the owner of land and another whereby that other undertook to construct and equip a railway on the lands of the owner and to deliver possession of the complete railway to the owner on a fixed day, retaining only a right to be compensated, secured by a charge which was to give no right to possession.

It is argued on behalf of the plaintiff that this is an agreement for the sale of lands to the defendant. What lands? All the plaintiff's rights over the defendant's lands expired on 1st September, 1932, and were not the subject of any transfer. Under the contract, the plaintiff did certain work and brought certain materials to the defendant's lands and for this it is to be duly compensated. It is true that, "subject to the defendant's rights as owner of the land", the railway and equipment are to remain the property of the plaintiff during the life of the contract; but, whatever this may mean, (it may refer to such equipment as was not affixed to the land), I cannot see that it affects the question to be decided here, nor that it makes any difference to the nature of the transaction that delivery of the railway contracted for takes place 40 years after, rather than immediately upon construction. On the 4th December, 1891, the Company agreed to transfer something to the Commission; if that something was land, then it was "land" which the Company was to construct. With great respect, I do not agree with this reasoning, and, unless bound by authority, cannot so hold. It appears to me that, if the contract was not simply one *sui generis*, falling into no particular class, it was essentially one for the supply of work and materials. In the main, therefore, subject to authority, I think the compensation money was not purchase money for land, but simply money due under a contract.

Mr. Slaght based an argument, which perhaps I do not clearly follow, on the use of the words "duly compensate", contending that those words in some way in themselves exclude all interest. "Compensation" is the word commonly used in the cases and statutes to distinguish a compulsory taking or expropriation from a sale by agreement. See the cases cited and The Public Works Act, R.S.O. 1937, ch. 55, ss. 21 to 35; The Municipal Act, R.S.O. 1937, ch. 266, Part XV. It is perhaps sufficient to notice that Section 351 of the latter Act reads,

"The arbitrator may allow interest on the compensation at the rate of 5 per cent. per annum from a day fixed by him."

Although the word seems to have no direct bearing on the question of interest, its use may indicate that the contracting parties did not regard the agreement as one of sale and purchase. It is not suggested that there is anything in the nature of expropriation in the transaction.

I have mentioned the fact that, to the extent of \$30,450, lands, which had been acquired by the Company pursuant to the contract, were transferred to the Commission. These lands had not been the property of the Commission and do represent a sale or transfer of land to the Commission. If this transfer and the portion of the compensation paid on its account are severable from the remainder of the contract, which I doubt, the equitable rule relied on might apply to the sum of \$30,450 so as to entitle the Company to interest on that sum from the date of taking possession, 1st September, 1932, to the date of the award, and, in that event, interest on that interest from 3rd June, 1937, to the date of judgment. Since the rule sought to be applied is one of equity, it can scarcely be argued that because of land valued at \$30,000, interest amounting to \$250,000 on a general contract should be paid. Mr. Pickup definitely disclaimed any reliance on the fact that this small amount of land was transferred and contended throughout that, even if there had been no land of this kind, the contract would still be one for the purchase and sale of land.

Mr. Pickup tells me that, no matter what my opinion may otherwise be, I am compelled by authority, in a case indistinguishable on the facts, to hold that the agreement in the case at bar is one for the sale of land, and he cites the Toronto Railway cases: [1925] A.C. 177 and (1926), 59 O.L.R. 73. The facts in

those cases are fully set out in the judgment of Viscount Cave in the Privy Council, and I quote from the report, at page 179:

"In the year 1891 the Corporation (of the City of Toronto), having agreed to take over from the Toronto Street Railway Company (an old company which has now disappeared) the street railway of that company in Toronto and the real and personal property connected therewith, invited tenders for the purchase of an exclusive right to operate surface street railways in Toronto (except in certain parts of the City) for a period of twenty years, which was to be extended to thirty years in the event of legislation being obtained to enable that to be done. Under the conditions of sale upon which the tenders were to be made the person whose tender was accepted (therein called "the purchaser") was to take over all the property to be acquired by the City from the Toronto Street Railway Company at the amount of the award under which the city was to acquire that property."

"There were also other conditions of sale, including the following:

7. At the termination of this contract the city may (in the event of the Council so determining) take over all the real and personal property necessary to be used in connection with the working of the said railways, at a value to be determined by one or more arbitrators . . ."

The contract resulting from the acceptance of a tender was confirmed by statute, which contained this provision:

"If the city of Toronto desires to exercise the right of taking over the property necessary to be used in the working of the railways at the termination of the said period of thirty years, it shall, not less than twelve months prior thereto, give . . . to the company . . . notice of its intention so to do."

The City did give the notice, the award of the arbitrators was confirmed by the Privy Council, and, in the Appellate Division of this Court in subsequent litigation, the Company was held entitled to interest on the amount of compensation awarded. The decision is, of course, binding on me.

I think that the Toronto Railway case is clearly distinguishable from the case at bar. In the former case there was an outright sale by the City to the successful tenderer, the City retaining only an option to purchase which it was under no obligation to exercise. If the option had not been exercised, the

company which had been the successful tenderer would have remained the absolute owner of the property purchased, but without any right to operate street railways in the City of Toronto. When the City by an independent act exercised its option, a new agreement for the purchase of the real and personal property necessarily used by the company in connection with the railway was effected. The equitable rule applicable to purchase money of land was applied to the compensation payable under the agreement. Because of the inclusion of personal with real property, the case appears to extend the application of the equitable rule farther than any earlier case. Counsel were able to refer me to no other case which carried the rule so far. I think that the case must be taken to hold that where there is a contract for the sale of real property, designed for a particular purpose, personal property necessarily incidental to the use of the real property for that purpose, will fall within the application of the rule.

I do not think that I should be justified in extending still farther the application of the rule. As I view the facts, in the case at bar, there was no sale or transfer of land under the contract, except as the merest incidental. The contract between the parties, while it dealt with the use and improvement of the defendant's land, in no sense looked to purchase and sale. Treating the contract as one between two ordinary private parties, I can see no reason why the provisions of The Judicature Act relating to the payment of interest should not govern the rights of the parties here. The plaintiff agrees, I understand, that nothing in that Act, apart from the equitable rule it has unsuccessfully invoked before me, gives it any right to interest.

Before turning to consider the second ground of defence, I should point out that it is not suggested on behalf of the plaintiff, that the contract itself, by its terms or by necessary inference therefrom, provides for payment of any interest. It is my opinion that, if no question of land were raised, no one could argue that any interest whatever is payable by any term of the contract, express or implied.

The second ground of defence raises the general question of the right to sue a servant of the Crown on a contract made on the Crown's behalf, and necessitates an inquiry into the status of the defendant and whether the contract sued on here is one made on the Crown's behalf. Many authorities were referred to by

counsel, but it is not necessary, I think, to deal with them all, and I do not propose to do so.

The law is well settled that, apart from some special statutory provision, a subject seeking to recover on a contract made with the Crown must proceed by petition of right: *The King v. Central Railway Signal Company Inc.*, [1933] S.C.R. 555, per Duff C.J.C., at page 563; and an action is not maintainable on such a contract against the servant of the Crown who actually made the contract, either personally, or in his official capacity: *Palmer v. Hutchinson* (1881), 6 App. Cas. 619, at p. 626. The fact that the Crown servant is incorporated does not in any way affect this rule: *Commissioner of His Majesty's Works & Public Buildings v. Pontypridd Masonic Hall Company Ltd.*, [1920] 2 K.B. 233. In *Mackenzie-Kennedy v. Air Council*, [1927] 2 K.B. 517, it was held that, notwithstanding the fact that the Act establishing the Air Council expressly provided that "The Air Council may sue and be sued and may for all purposes be described by that name," an action could not be maintained against the Air Council, whether a corporation or not, in its capacity as representing the Crown.

In *Rattenbury v. Land Settlement Board*, [1929] S.C.R. 52, Newcombe J., at page 63, said:

"While it is certainly true that the revenues of the Crown cannot be reached by judicial process to satisfy a demand against an officer or servant of the Crown in any capacity, whether incorporated or not, . . . the Court will interfere to restrain *ultra vires* or illegal acts by a statutory body . . ."

The plaintiff relies on *Graham et al v. His Majesty's Commissioners of Public Works and Buildings*, [1901] 2 K.B. 781. This was the decision of two judges, Ridley and Phillimore JJ., sitting as a Divisional Court. The headnote accurately sets out the result of the case and is as follows:

"An action will lie against His Majesty's Commissioners of Public Works and Buildings, who are incorporated by statute, for damages for breach of a contract entered into by them with a firm of builders for the erection of a public building.

"So held, by Ridley J., because the Commissioners must be taken to have made the contract specially themselves, and not as agents of the Crown;

"By Phillimore J., because the Commissioners are in the position of servants of the Crown who may be sued on their con-

tracts for the purpose of obtaining a judgment declaratory of the right of the subject who has contracted with them."

So far as this decision rests on the reasoning of Phillimore J., it must be taken to have been overruled by the unanimous decision of the Court of Appeal in *Hosier Brothers v. Earl of Derby*, [1918] 2 K.B. 671, which held that an action on a contract could no more be brought against a servant of the Crown for a declaration as to what the contract meant than for substantive relief on the contract itself. The *Graham* case was cited on the argument before the Court of Appeal. See also the report of *Mackenzie-Kennedy v. Air Council*, [1927] 2 K.B. 517, at page 518 where the reporter's statement of facts indicates that the Court of Appeal had held in connected litigation that claims in contract could be raised only by petition of right and not by action.

I think the authorities I have cited correctly set out the law, and it follows that, if the defendant in the present case was a servant or agent of the Crown and entered into the contract in that capacity, this action is not maintainable. The *Graham* case relied on by the plaintiff will apply only if the defendant can "be taken to have made the contract specially themselves, and not as agents of the Crown."

In *Graham v. Commissioners for Queen Victoria Niagara Falls Park* (1896), 28 O.R. 1, a Divisional Court considered the status of the present defendant, under another name, as it was at the time the contract the subject of this present litigation was executed. The headnote reads in part:

"The Commissioners, under the provisions of the statutes in that behalf, under any circumstances, act in the discharge of their various duties as 'an emanation from the Crown' or as agent of the Crown . . ."

As Mr. Pickup contends that this was not the decision of the Court, a consideration of what actually was decided thereby is necessary.

The action was in tort for injuries received by the plaintiff caused by a fall through a defective fence or railing at the edge of the cliff on the lands of the Commission. The Court was composed of two Judges. Meredith C.J. begins his judgment, at page 4, as follows:

"I have reluctantly come to the conclusion that the plaintiff's action cannot be maintained. I say reluctantly because the jury

have found that the plaintiff has, without any contributory negligence on her part, suffered a very severe injury owing to acts of negligence on the part of the defendants' servants, for which she has a moral claim to be indemnified, and which, had the Legislature of this Province adopted what I may be permitted to call the more enlightened policy as to the liability of the Crown for wrongs committed by its servants which finds a place in the legislation of Canada and of several of the colonies of the Empire, might possibly have been a legal claim also against the Province;" and, commencing at page 10 of the report he discusses the statute controlling the Commission and establishing its status. There can be no doubt that Meredith C.J. was of the clear opinion that the defendant Commission was the servant or agent of the Crown. Although Meredith C.J. found that the defendant Commission seemed also to have a good defence on the merits apart from Crown immunity, Rose J. decided for the defendant on the sole ground that an action for tort could not be maintained against the Crown.

I have been referred to nothing in subsequent statutes that would in any way affect the status of the defendant, and the decision of the Divisional Court is, therefore, binding on me.

In *Re Oakes and Township of Stamford* (1926), 58 O.L.R. 624, a Divisional Court again held that the Commissioners were an emanation or agents of the Crown and that they held lands, which technically were vested in them, for the Crown and in no other capacity.

Again, in *Queen Victoria Niagara Falls Park Commissioners v. International Railway Co.* (1928), 63 O.L.R. 49, both Fisher J., as he then was, at trial, and Grant J.A., who delivered the main judgment on appeal, assumed without question that the plaintiff Commissioners were in fact the Crown *qua* the action and the rights of the parties.

Finally, there is a passage in the judgment of Meredith C.J.C.P., in *Scott v. Governors of University of Toronto* (1913), 24 O.W.R. 325, at page 326, which is to the same effect.

I am of the opinion that by judicial authority I am bound to hold that the defendant Commission is an emanation from the Crown and the servant or agent of the Crown. If no such judicial authority existed, an examination of the Statute, The Niagara Parks Act, R.S.O. 1937, ch. 93, would lead to the same conclusion. Practically every power given to the Commission by that Act is

subject to the control of the Lieutenant-Governor-in-Council. An order in council is apparently necessary for the dismissal of the humblest servant of the Commission. I shall not go over the Act in detail but wish to draw attention to one or two sections:

"9. All works or land whereon any expenditure is authorized in pursuance of this Act shall be deemed and are declared to be public works of Ontario notwithstanding that they are in the care or charge of the Commission."

The Public Works Act, R.S.O. 1937, ch. 54, sec. 7, provides that, "All public works . . . not under control of the Government of Canada, shall unless otherwise provided by law be and remain vested in His Majesty and under the control of the Department."

By section 21 of The Niagara Parks Act, all revenue of the Commission, not spent in one of the three ways permitted by the section, is to form part of the Consolidated Revenue Fund of Ontario.

Turning to the contract itself, as well as to the statute confirming it, we find it recited that the Commissioners act therein "on their own behalf as well as on behalf and with the approval of the Government of the Province of Ontario."

It is clear, I think, that the second ground of defence, on the settled authorities, must prevail. The defendant is an emanation of the Crown and it expressly entered into the contract in question on behalf of the Crown. What effect the words "on their own behalf" may have on the contract I do not know. It is plain that the defendant Commission has no other capacity than that of Crown agent or servant. It is not sought to hold any individuals liable, and the Commission is sued in its official capacity. The position of the Commission is not the same as that held by the Public Works Commissioners as described by Ridley J., in the *Graham* case, [1901] 2 K.B. 781, as the contract here is plainly one in which the Commissioners have no interest, except as the agents of the Crown and as dealing with Crown lands.

In its reply, the plaintiff sets up an estoppel or waiver which, I am told, prevents the defendant from denying the plaintiff's right to maintain this action because of any Crown prerogative. The plea is based on a letter, dated 12 August, 1937, written by the solicitors who then acted for the Commission to the solicitor for the Company. It was a letter with which was enclosed a cheque for \$22,051.61, interest on the award, and which explained

how the amount was made up. The paragraphs relied on by the plaintiff are as follows:

"We are making the above payment on the understanding that by accepting this cheque you do not admit that it constitutes payment in full and that you are at liberty to cash same and still enter suit for any balance you claim for—if your clients still adhere to the view that any further interest is due.

"Should they decide to sue, we are obtaining instructions to accept service of the writ."

The writ was issued and the solicitors who wrote the letter accepted service and appeared and defended the action.

It is argued that the letter I have quoted and the acceptance of service in some way prevent the defendant from setting up that the action is not maintainable. I find myself quite unable to believe that the letter was intended by the defendant's solicitors or taken by the plaintiff to have any such meaning. The letter was written, I think, with no other meaning than that any further claim would be resisted and was, at worst, a somewhat cocky invitation to a fight. In my opinion, the contention of the plaintiff as regards this letter is without merit. On the point of the authority of the solicitors to bind the consolidated revenues of the Province by such a letter, *Walkerville Brewery Ltd. v. The King*, [1939] S.C.R. 52 may be referred to. I cannot see how any estoppel is raised against the Crown, and if this letter is to be regarded as an agreement, there was an entire absence of consideration, since neither the acceptance of the cheque without prejudice nor the issue of the writ was in any sense consideration for such a promise.

This action is therefore dismissed with costs.

The plaintiff appealed to the Court of Appeal from the judgment of J. G. Kelly J.

October 12th and 13th, 1939. The appeal was heard by RID-DELL, McTAGUE and GILLANDERS JJ.A.

J. W. Pickup, K.C., and *J. W. G. Thompson*, for the plaintiff, appellant.

A. G. Slaght, K.C., and *R. I. Ferguson*, K.C., for the defendant, respondent.

November 1st, 1939. The judgment of the Court was delivered by McTAGUE J.A.:—This is an appeal from a judgment of

the Honourable Mr. Justice Kelly dated the 24th day of July, 1939.

The action is for interest on moneys awarded the plaintiff as compensation in an arbitration proceeding as finally determined by the Judicial Committee of the Privy Council. See *International Railway Co. v. The Niagara Parks Commission*, [1937] O.R. 607.

The facts are sufficiently set forth in Lord Macmillan's judgment and in the judgment of my brother Kelly appealed from. Suffice it to say that neither the arbitrators nor the Privy Council dealt with the matter of interest, the Judicial Committee holding that the plaintiff must seek enforcement of its claim to interest, if any, in separate proceedings.

As Kelly J. points out in his admirable and very able judgment, the plaintiff bases its claim on the well known principle in equity enunciated in *Birch v. Joy* (1852), 3 H.L.C. 565, that, "It is a general rule of equity, that if a purchaser is in possession of an estate, receiving the rents, he is liable to pay the purchase money, and that the purchase money being retained by him will carry interest to be paid by him to the seller". The rule applies in vendor and purchaser agreements with respect to sale of lands. It does not apply to contracts for the purchase and sale of goods or chattels as such when not part and parcel of a contract involving the sale of lands. It seems quite clear that it does apply in cases involving the sale of lands which include equipment and buildings all as part of a railway undertaking: *Toronto v. Toronto Railway Co.*, [1925] A.C. 177, and (1926), 59 O.L.R. 73.

The rule is only applicable where the relation of vendor and purchaser truly exists, and such a relationship has been held to exist in cases of compulsory expropriation where it is created by the notice to treat: *Rhys v. Dare Valley Railway Co.* (1874), L.R. 19, Eq. 93, and *Inglewood Pulp and Paper Co. Ltd. v. New Brunswick Electric Power Commission*, [1928] A.C. 492. Or where one of the parties to a franchise agreement has an option to buy and exercises the option: *City of Toronto v. Toronto Railway Co.*, [1925] A.C. 177. Where there is a true vendor and purchaser relationship, the right to receive interest takes the place of the right to retain possession as pointed out by Lord Warrington of Clyffe in *Inglewood Pulp and Paper Co. Ltd. v. New Brunswick Electric Power Commission*, [1928] A.C. 493, at p. 499.

Generally speaking, I am in agreement with the analysis of the learned trial Judge as to the nature of the contract dated the 4th of December, 1891, although I am not disposed to compromise myself and baldly define it as one for the supply of work and material. I rather prefer to view it as an agreement by which the defendant granted the plaintiff's predecessors as private undertakers a franchise for a limited period, coupled with an obligation on the part of the plaintiff at the end of the period to accept compensation to be ascertained by arbitration in the manner provided in the agreement for whatever investment they had made pursuant to the franchise originally granted them.

Viewed in this way, it must be apparent that at the end of the period the plaintiffs had nothing to sell. They did not then own a railway. All they had was a right to compensation for the loss of their investment under their original contract. It seems to me that the transaction which took place at the end of the period is part and parcel of the franchise agreement and cannot be considered in any way separate from it. That this view is the correct one appears to be substantiated very definitely by paragraph 26 of the agreement by which the plaintiff is specifically obligated to give up possession before compensation is ascertained or paid. In my opinion, this is not a vendor and purchaser transaction in the true sense of the word at all, and the plaintiffs, being specifically disentitled to possession under the contract, cannot have interest in lieu thereof under the equitable principle. The contract itself is silent as to interest, and there can be no relief in law as contrasted with equity.

On the other branch of the case by which he held that this proceeding could only be launched by petition of right, I am also in accord with my brother Kelly. The defendant is an emanation of the Crown. It has been so held to be in this Court as pointed out in the trial Judge's reasons. Once that conclusion is established, it follows that it must be proceeded against by petition of right unless one can find statutory authority for holding otherwise. The mere fact that the defendant Commission is defined as a corporation makes no difference. One must look beyond that and ascertain whether the immunity against action except by petition of right has been waived, either in the statute creating the corporation, or in some other statute. There can be no doubt as pointed out by Phillimore J., in *Graham v. His Majesty's Commissioners of Public Works*, [1901]

2 K.B. 781, that it is within the competence of the Crown for its own convenience, or that of His Majesty's subjects, to waive its rights and permit its emanation to be sued in the ordinary way. But such intention must be clear from the statute. In the light of more recent decisions the *Graham* case as a decision may perhaps be considered to have been overruled, but the principle enunciated by Phillimore J. in this regard is still good law. In regard to the defendant here, I can find nothing in the statutes which would take away its immunity to be proceeded against otherwise than by petition of right. The mere fact that it is defined as a corporation and that under The Interpretation Act, R.S.O. 1937, ch. 1, sec. 28, a corporation may sue or be sued is not strong enough to destroy its usual right as an emanation of the Crown.

In *Gooderham & Worts Ltd. v. Canadian Broadcasting Corporation*, [1939] O.W.N. 507, this Court held that the Canadian Broadcasting Corporation, although an emanation of the Crown, could be proceeded against in the ordinary Courts without petition of right. That decision was based upon a special section of the incorporating Act when read together with the powers given to the corporation. In other words, we concluded that the Canadian Broadcasting Corporation was in essence one of commercial character and that, for its own convenience and that of persons contracting with it, it could sue or be sued in the ordinary Courts in the ordinary way. The statute creating the Niagara Parks Commission is quite different. The Commission holds its lands as trustee for the Crown, and its surplus goes into the Consolidated Revenue Fund. There is nothing in its Act to take away the immunity to which an emanation of the Crown is in law entitled, and The Interpretation Act is not specific enough to justify a conclusion in favour of the plaintiff's contention.

The plaintiff did not seriously press any claim to interest under the provisions of The Judicature Act, R.S.O. 1937, ch. 100. In any event I do not think they apply to this case. I also agree with the learned trial Judge's view of the significance to be fairly attached to the letter of August 12th, 1937.

The rights of the plaintiff here can only arise out of the contract of the 4th day of December, 1891. That contract specifically provided what the plaintiff was to be entitled to at the end of the term as compensation for its investment and how it was to be ascertained. While there was a good deal of unneces-

sary delay in ascertaining the compensation, no question of bad faith arises.

For these reasons I think the plaintiff is not entitled to succeed. I would affirm the judgment below and dismiss the appeal with costs.

Appeal dismissed with costs.

[COURT OF APPEAL.]

Re Cameron.

Cameron v. The Toronto General Trusts Corporation.

Wills—Interpretation—Annuity to wife of A.—Whether second wife of A. entitled to annuity—Contracts—Mutual mistake of fact—Executors—Compromising claims—The Trustee Act, R.S.O. 1937, ch. 165, sec. 47.

By his will made in 1893 the testator gave an annuity of \$3,000.00 per year to his son during the natural life of his son, and he further provided that "if my son's wife shall survive him, I direct my trustees to pay to her during her natural life the yearly sum of \$1,000.00".

At the dates of the will and death of the testator in 1893 his son was married to a lady who died in 1902. The son subsequently married the plaintiff in 1904, and the son died in 1938. In this action, the plaintiff claimed that she was entitled to payment of an annuity of \$1,000.00 during her life.

Held, that the plaintiff was not entitled to the annuity, since there was nothing in the will to alter the *prima facie* rule that a testator, in making a gift to the wife of a person who has at the time a wife living and acknowledged by the testator, intends to refer to the existing wife, and not to any subsequent wife that person may have.

The plaintiff, in addition to relying on the will of the testator, also relied on an agreement, dated 1914, made between herself and the then two surviving executors of the estate of the testator.

Held, that it was doubtful whether this document purported to confer on the plaintiff any right to an annuity but, assuming that there was such an agreement to pay the annuity, it was beyond the powers of the executors and no residuary beneficiary concurred in the agreement. When the agreement was executed in 1914, all parties mistakenly assumed that the plaintiff by virtue of the will had a right to the annuity, and it could not be said that the surviving executors were compromising a disputed claim within their powers under The Trustee Act. Moreover, the agreement of 1914 could be disregarded because it was based on an essential mistake of fact common to all the parties thereto.

TRIAL of an issue.

The issue was tried by J. G. KELLY J. without a jury at Toronto.

J. Shirley Denison, K.C., and D. H. L. Lamont, for Luella V. Cameron, the plaintiff.

A. B. Mortimer, for The Toronto General Trusts Corporation as trustee of the above estate.

Hamilton Cassels, K.C., for The Toronto General Trusts Corporation as representing several residuary beneficiaries of the said estate.

W. R. Wadsworth, K.C., for John C. Cartwright, a residuary beneficiary.

J. G. Middleton, for A. G. B. Cameron, a residuary beneficiary not opposing.

July 31st, 1939. J. G. KELLY J.:—This is an issue directed by the order of the Honourable Mr. Justice McFarland, dated 25th January, 1939, and made on a motion for the advice and direction of the Court on a question arising under the will of the deceased Alexander Cameron in the following circumstances.

Alexander Cameron, a man of considerable wealth, made his will on the 12th of May, and died on the 15th of May, 1893, leaving him surviving his widow and three married children, two daughters and one son. On the 30th of November, 1893, probate was granted to three of the executors named in the will, namely, Alfred Buell Cameron, who was the testator's son, John Curry and Edward Douglas Armour, K.C.

By the will which is very clearly drawn, apart from certain gifts which do not concern us here, the whole estate is disposed of by giving life-annuities to the children, and, at the end of twenty-one years from the testator's death, dividing the capital less an amount sufficient to produce, at 4 per cent. per annum, the said annuities, among the testator's grandchildren. As the respective annuities determined, the portion of the capital reserved for payment thereof was to be similarly divided. The foregoing description of the will is not meant to be exact, but is sufficiently accurate for its purpose.

The paragraphs of the will which give rise to the issue here to be determined are:—

"6. . . . (after providing the daughters' annuities)

"To my son Alfred Buell Cameron the sum of three thousand dollars each year in quarterly instalments of seven hundred and fifty dollars each on the first days of January, April, July and October in each and every year during his natural life, the first quarterly payment to be made on the quarter day next after my death, and the amount then payable to be an amount proportionate to the broken period of time. And if my son's wife shall survive him I direct my trustees to pay to her during her

natural life the yearly sum of one thousand dollars in quarterly sums of two hundred and fifty dollars each on the first days of January, April, July and October in each year the first quarterly payment to be made to her on the quarter day next after my son's death and the amount to be then payable to be an amount proportionate to the broken period."

The paragraph numbered 10 disposes of the residue of the estate, and I set out verbatim only that part that appears to be relevant to the issue:

"10. At the expiration of the said period of twenty-one years from my death I direct my Trustees after setting apart an amount sufficient to produce at four per centum per annum the annual payments hereinbefore directed to be made to divide my Estate into three parts to be called the Cameron, Torrance and Cartwright shares and"

At the dates of the will and death of the testator in 1893, his son, Alfred Buell Cameron, was married, the son's wife at that time being Alice M. Walker Cameron who died, however, in 1902. Alfred Buell Cameron married the plaintiff on 11th August, 1904, and he died on 19th October, 1938. He left a son by his second marriage and his widow, the present plaintiff, him surviving.

The plaintiff claims a declaration that she is entitled to payment from the estate of Alexander Cameron of an annuity for her life of \$1,000.00 commencing at her husband's death, and consequential relief. This claim is based on several grounds which may be conveniently dealt with separately.

First. The plaintiff points to the words used in paragraph 6 of the will: "And if my son's wife shall survive him I direct my trustees to pay to her during her natural life the yearly sum of one thousand dollars" She states that she was the son's wife, that she survived him, that therefore she comes exactly within the literal meaning of the words of gift.

The defendants object that at the time the will was executed and up to the testator's death, another living person answered the description "my son's wife," and that the testator must be taken to have referred to the wife living at the time he signed the will. The problem is not new and has been the subject of judicial decision. The authorities, if there are authorities in will cases, must be considered.

In re Lyne's Trust (1869), L.R. 8 Eq. 65, a decision of Malins V.C., is a case directly in the plaintiff's favour. In that case

the first wife living at the date of the will died before the testator, but the reasoning of the case does not turn on that point of difference from the case at bar. The decision was disapproved and not followed by the Court of Appeal in *In re Coley*, [1903] 2 Ch. 102, where the reasoning of Vaughan-Williams and Romer L.JJ. is quite inconsistent with the earlier decision. At page 110, Romer L.J. states the rule of construction as follows:

"It is settled that if in a will you find a gift by the testator to the 'wife' of a person, and that person has at the time a wife living and acknowledged by the testator, the testator *prima facie* intends to refer to the existing wife, and not to any subsequent wife that person may have; unless, indeed, there may be a sufficient context to enable the Court to say that the testator is referring also to a subsequent wife, and that the *prima facie* meaning of the gift is displaced. But there must be a sufficient context to show that."

In *Firth v. Fielden* (1874), 22 W.R. 622, Jessel M.R. in a similar case, in which the *Lyne's* case was cited in argument, did not follow it and held the donee intended was the wife alive at the date of the will. But in *Re Lory* (1891), 7 T.L.R. 419, Chitty J. followed the *Lyne's* case, feeling that in the will before him a family provision was so plainly intended that it was an even stronger case than the *Lyne's* case. Again, in *In re Griffiths' Policy*, [1903] 1 Ch. 739, Joyce J. refused to follow the *Lyne's* case.

Any words in the context may alter the effect of the will and overcome the *prima facie* rule referred to by Romer L.J. Thus, where a gift to a man of income was suspended on his bankruptcy and paid to his wife for the family, the fact that bankruptcy might occur with a second wife was sufficient to alter the rule: *In re Drew*, [1899] 1 Ch. 336; *Longworth v. Bellamy* (1871), 40 L.J. (Ch.) 513. *In re Browne's Policy*, [1903] 1 Ch. 188, although at first impression in favour of the plaintiff's claim, was decided under a statute as explained in *In re Griffiths' Policy*, [1903] 1 Ch. 739, and is not a decision in favour of the plaintiff. Incidentally it was decided by the same Judge who decided *In re Coley*, [1903] 2 Ch. 102, at trial.

Without discussing them in detail, I should, I think, mention some other cases cited. *Wilmot v. DeMill* (1893), 32 N.B.R. 8, a case from New Brunswick in which the decision of the Judge at first instance was upheld by an equal division of Judges on

appeal, adopts the same reasoning as that followed in the *Lyne's* case. In this case the first wife had predeceased the testatrix and this was urged in argument as an additional reason for holding that a subsequent wife of the donee took under the will. The reasoning in the following cases was against the plaintiff here: *Garratt v. Niblock* (1830), 1 R. & My. 629; *Boreham v. Bignall* (1850), 8 Hare 131; *Re Burrow's Trusts* (1874), 10 L.T.R. (N.S.) 184; *In re Laffan and Downes Contract*, [1897] 1 Ir. 469; *Blount v. Crozier*, [1917] 1 Ir. 461.

The foregoing cases, or most of them, are discussed in Jarman on Wills, 7th ed., p. 374. The authors appear to regard the rule laid down in *In re Coley*, [1903] 2 Ch. 102, as settled. The first of three rules stated by Jarman appears to apply to the present case:

"First, that a devise or bequest to the wife of A., who has a wife at the date of the will, relates to that person, notwithstanding any change of circumstances which may render the description inapplicable at a subsequent period, and, by parity of reasoning, is under *all* circumstances confined to her."

See, also, Theobald on Wills, 8th ed., page 302, where the cases are collected and discussed and the same conclusion reached.

I can find nothing in the context of this will to alter or overcome the *prima facie* rule that "the wife" of a named person means the living wife of that person, known to the testator, at the date of the will. Where this testator intended to deal with the possibility of successive marriages, the will shows that he could use apt words to make his meaning clear. For example, in the provision of paragraph 6 (which I have not quoted in this judgment) relating to the annuity given to the testator's daughter Mrs. Cartwright, he deals with this possibility by imposing a restraint upon anticipation "during *any* coverture".

The difficulty here arises because there is no reason to suppose that, if the testator had contemplated the circumstances now existing, he would have failed to extend his bounty to the plaintiff, who was to be his son's wife for more than thirty years. I think, however, that the rule is one of common sense. When the words were written they referred as precisely to one particular human being as if she had been named in the will. To speculate upon what the testator would have done in different circumstances is not to construe a will at all. Possibly, even

probably, the testator would have wished the present plaintiff to have the annuity; but he did not say so. There was no ambiguity in the language he used when he signed the will. With every respect to Mr. Denison's able argument, I think that to extend the meaning of the words used to include the plaintiff would be to write a will for the testator forty-six years after his death.

If this opinion is correct, and I am conscious that there has been a difference of judicial opinion in the past, the plaintiff's claim fails on the first ground put forward; she takes nothing directly under the terms of the will. The other grounds advanced on her behalf do not come from anything in the will itself; they must now be considered.

By the terms of the will (paragraph 10), subject to the retention by the executors of an amount sufficient to produce at 4 per cent. per annum the annuities payable thereunder, the estate was to be distributed twenty-one years after the testator's death. The period expired in May, 1914. At that time there were two executors surviving, E. D. Armour and the plaintiff's husband, Alfred Buell Cameron. The plaintiff and the two executors executed a document under seal, dated the 15th day of June, 1914, which must be described in some detail. This document affords the second ground upon which the plaintiff's claim is based.

The document describes the plaintiff, who is the party of the first part named therein, as the wife of Alfred Buell Cameron. It is in form a release. Very full recitals are used to explain both its purpose and the state of facts upon which it proceeds.

In the recitals the provision relating to the annuity to the wife of the testator's son if she survives her husband is set out verbatim, and the provisions relating to the other annuities and the duty to set apart a sum sufficient to provide for these before distributing the estate are summarized. The fact that the time for distribution has arrived is stated. It is recited that the executors have set apart sufficient to provide for annuities then payable. The last two recitals had better be set out in full; they are important:

"And whereas in order to enable the said parties of the second part to divide and distribute the whole estate save that part set aside for annuities without retaining a sum to secure the contingent payment to the party of the first part, the party of the first part is willing to restrict and confine her lien on the said estate as hereinafter set forth."

“And whereas that portion of that part of the assets set apart to produce the annuities aforesaid which will provide the annuity of three thousand dollars a year to the said Alfred Buell Cameron will be sufficient to produce and secure payment of one thousand dollars per annum to the party of the first part in case she shall survive her husband.”

The operative part of the document follows. “In consideration of the premises and for effecting the said purpose”, the plaintiff releases all her right title and interest in the estate save that portion set aside to provide her husband’s annuity and releases the executors from all obligation “to provide for the said contingent payment of one thousand dollars” to her save out of the moneys set aside for her husband’s annuity “so that upon the death of the said Alfred Buell Cameron during the life time of the party of the first part the trustees of the said will for the time being shall hold a sum sufficient at four per cent. per annum to produce three thousand dollars per annum and out of the income of the same shall pay to the said party of the first part the sum of one thousand dollars per annum during her life time in case she shall survive the said Alfred Buell Cameron as directed by the said will.”

For the plaintiff it is contended that this document is an agreement by the executors which binds the estate to pay an annuity of \$1,000.00 to the plaintiff during her life time from her husband’s death.

Several objections to this contention are made by the defendants. First, it is denied that the document is in fact, or ever was intended to be, an agreement to pay anything to the plaintiff. Second, if it is an agreement, it is beyond the powers of the executors to bind the estate in this way. Third, if it is in fact an agreement otherwise binding on the estate, it is clearly founded on a mutual mistake of fact and should be set aside.

An examination of the document itself seems to me to make it clear that the parties to it did not think that it created the obligation to pay the annuity. The recitals, on which the document proceeds, treat the obligation to pay as one clearly arising from the will and not in dispute between the parties. The agreement in its terms deals with the fund out of which an admitted obligation shall be met. The will itself did not require a separate fund to be set aside to provide for the payment of the contingent annuity and, even if the plaintiff were entitled under the will, the

agreement was not necessary. If the parties, as I think they plainly did, assumed the obligation to pay the annuity to the plaintiff to arise directly from the will, the document dated the 15th of June, 1914, is then nothing more than evidence of extreme caution on the part of the executors.

But, it is argued, the language used is the language of obligation; the parties evidently thought that the plaintiff had the right to insist on a separate fund to provide for her contingent annuity and she expressly relinquished this right, at the request of the executors, in return for their undertaking to pay the annuity to her out of another fund. This is a formidable argument. I should be most reluctant to accede to it because I think that this language used in the document is nothing more than an attempt to limit precisely the extent of the release given. I am of the opinion, however, that the second and third objections to the plaintiff's contentions regarding this document must prevail.

The defendants object that executors have no power, without concurrence of the beneficiaries, to make an agreement which binds the estate to pay an annuity to a stranger. I find on the evidence that no residuary beneficiary did concur in the agreement. The plaintiff relies on the provisions in the Trustee Act which empower personal representatives to compromise any claim, by legatee or creditor, against the estate (R.S.O. 1914, ch. 121, sec. 52; now R.S.O. 1937, ch. 165, sec. 47). But nothing was compromised in this agreement. The plaintiff did not contend for one thing which the executors refused or were unwilling to allow. There was no difference between the parties. The payment or non-payment of the annuity, or the plaintiff's right thereto, was not the subject of agreement. The plaintiff herself says that her right to the annuity was never questioned by any person before her husband's death. If therefore the right to the annuity depends on the executors' undertaking impliedly given in the release, then that undertaking must have created the right, not by way of compromise of a claim, but by new promise. I find nothing in The Trustee Act giving to executors, or trustees, any such power.

The defendants' third objection is that, even if the document dated 15th June, 1914, is an agreement otherwise binding the estate, it is so plainly founded on a common mistake of fact that it cannot be allowed to have effect. I think this is so and that, in a proper proceeding, the agreement would be set aside on this

ground. It is a carefully drawn document containing full recitals of the state of facts upon which it proceeds. The essential mistake, common to the parties, found in these recitals is that the plaintiff is entitled upon her husband's death in her life time to an annuity of \$1,000.00 under the will of Alexander Cameron. This is a mistake of fact: 23 Halsbury (2nd ed.) page 131; *Allcard v. Walker*, [1896] 2 Ch. 369. The principle and reasoning applied and followed in *Lawton v. Campion* (1854), 18 Beav. 87, appear so completely applicable to the case at bar that I quote the headnote, in part, which sets them out accurately:

"Children . . . insisted as against their uncle . . . that they were entitled, under the terms of a settlement to have their portions raised from the death of their father in 1831. An arrangement was come to by deed, which, proceeding on the foundation of the validity of the claim, compromised the amount of arrears of interest, and settled the amount of the future interest, which the uncle thereby engaged to pay. It having been afterwards determined, in another suit, that on the true construction of the settlement the claim of the children was unfounded, the uncle instituted a suit to set aside the deed. *Held*, that if the right to have the portions raised in 1831 had formed one of the matters compromised, the transaction could not be disturbed, although the claim of the children turned out to be completely unfounded. But the Court, having arrived at the conclusion, that the parties had all proceeded on the foundation of the children's claim being unquestionable, and that all that had been compromised was the amount of arrears payable on that foundation, set aside the deed."

Finally, with regard to this document, the plaintiff contends that it was a clear representation to the plaintiff that she was entitled to the annuity. She said in her evidence that she and her husband relied on the annuity and lived up to the limit of his income during his lifetime as a result. She says the husband often said to her that she would be all right after his death as she could always count on \$1,000.00 a year from his father's estate.

If I am right in holding that the executors had no power as such to bind the estate by express agreement to pay the annuity to a person not otherwise entitled, it follows, I think, that the executors could not bind the estate by raising an estoppel, by conduct or words. Apart from this, I do not think the evi-

dence supports the conclusion necessary to raise an estoppel. The plaintiff said that from the date of her marriage she knew and relied on the right to the annuity. This always affected the way of living adopted by her husband and her. On this evidence alone, it is clear that the plaintiff did not change her position in any way by reason of the execution of the agreement, or by reason of any representation of fact it contained. This distinguishes the case relied on by counsel for the plaintiff: *De Tchi-hatchef v. The Salerni Coupling, Ltd.*, [1932] 1 Ch. 330, where by reason of representations contained in a prospectus, the company had incurred liability to subscribers if the representation were allowed to be deemed untrue.

It is my opinion, therefore, that so far as it is based on the deed dated the 15th of June, 1914, the claim of the plaintiff fails.

An argument is made on the fact that the plaintiff was treated for years as a person interested in the estate under the will. Thus she received notice of the passing of accounts and appears to have been represented thereon. She was described as a person interested in proceedings in this Court, and was awarded costs for counsel's attendance on her behalf. The short answer to this argument is that, until this very judgment, she has been entitled to notice, as a person interested in the estate, of all proceedings connected therewith. And if my decision should be reversed by a higher Court, she will be again a person interested. In other words, so long as it had not been finally decided by the Courts that the plaintiff was, in law, a stranger to the estate, she remained a person with a possible interest and entitled to all the recognition that appears to have been accorded to her. If there was any representation to her, it was the truthful one that there was a possibility that she might be entitled under the will.

Finally, it is said, there have been such laches and acquiescence on the part, not only of the executors or trustees, but of the residuary beneficiaries as well, or some of them, as to bar them from asserting that the plaintiff is not entitled to the annuity she claims. I do not follow this argument. Until Alfred Buell Cameron's death in his wife's life time, any motion to the Court would have been premature and a needless expense to the estate. There could have been before that no acquiescence in the plaintiff's claim as it was not ripe for consideration. Since her husband's death, nothing in the nature of acquiescence is sug-

gested. In my opinion, there is nothing in this contention that will assist the plaintiff.

As to any suggested criticism of the present trustee, or any of its officers, I am unable to find any grounds. I decide nothing about this simply because it is not before me in this present proceeding.

The plaintiff therefore fails in the issue. As this proceeding remains in substance a motion by a trustee for the advice and direction of the Court, I do not think any relief by way of setting aside the deed dated 15th June, 1914, can be given. Such relief requires a writ. I direct that, in distributing the estate, the trustees may disregard that deed.

Although the plaintiff fails, this proceeding was necessary and proper. The question whether she was entitled under the will had to be decided before the trustee could proceed to distribute the residue of the estate. That question was one of some difficulty. For this litigation, then, the plaintiff is not to blame and should not, I think, be penalized. The costs of all parties may well be paid out of the estate of Alexander Cameron, those of the trustee of that estate as between solicitor and client.

Luella V. Cameron appealed to the Court of Appeal from the order of J. G. Kelly J.

November 21st, 1939. The appeal was heard by MIDDLETON, MASTEN, FISHER, MCTAGUE and GILLANDERS JJ.A.

J. Shirley Denison, K.C., and D. H. L. Lamont, for Luella V. Cameron, appellant, contended that the appellant was within the very words of the will which bequeathed an annuity to "my son's wife" if she survives such son. While it is true that the *prima facie* rule is that a will refers to persons living at the time it is executed, this rule gives way to the manifestation of a different intention in the will. The whole scheme of this will clearly indicates that it was designed to ensure, for twenty-one years, at least, the financial security of his relatives and their dependents rather than a generosity by affection or regard. Only in the latter case would there be reason to think that the bequest depended on the personality of the son's wife. In this will (subject to certain legacies and annuities) distribution was postponed for 21 years, when a fund for annuities was to be

set up. The possibility of a different person answering the description of "his son's wife" at the time of the son's death may very well have occurred to the testator for he himself had been married twice. The will is very clearly drawn and obviously does not contemplate the lapse of this annuity.

There are striking indications in this will that the testator was not considering conditions existing at his death but rather at a period twenty-one years later, when the fund was to be set up for annuities, indicating that the particular annuity was for the person then in existence who answered the description "my son's wife"; and distribution was also to be made then to any child or other issue of the son A. B. Cameron, and in fact the only person who became so entitled was the son of the appellant, the second wife. These arguments confirm the view that a second wife is meant to take the annuity just as much as the one living at the time of the will.

The trend in Canada has been to give great scope to the term "wife": *Marks v. Marks* (1908), 40 S.C.R. 210; *Reeves v. Reeves* (1908), 16 O.L.R. 588. Various insurance cases are to the same effect: *Re Grindlay*, [1933] O.R. 28; *Armstrong v. Imperial Bank of Canada et al.*, [1938] O.R. 239.

Re Sharon and Stuart (1906), 12 O.L.R. 605, at p. 609, and *Wilmot v. DeMill* (1893), 32 N.B.R. 8, are the only Canadian cases in point and they are decided in favour of the second wife married after the date of the will. When this will was drawn, *Re Lyne's Trust* (1869), L.R. 8 Eq. 65 was quoted in leading texts as good law and was directly in the appellant's favour. The latter case was disapproved in *In re Coley*, [1903] 2 Ch. 102, but it is submitted that both wills in the light of the different circumstances therein were probably rightly interpreted.

Counsel for the appellant further submitted that, even if the plaintiff is not entitled under the will, she is entitled to relief by reason of the indenture of June 15, 1914, which is, in form, a release by the plaintiff to the executors. The document in extensive recitals explained that its purpose was to permit the executors to distribute the balance of the estate, save that fund set aside to pay her husband's annuity. It obviously assumed that the appellant was entitled under the will to the annuity she now claims. The operative part of this document provided that

the appellant should release all her interest in the estate, save the portion set aside to provide her husband's annuity, and releases the executors from liability to set aside any sum besides the sum set aside for her husband's annuity. This document is clearly an agreement to pay the \$1,000.00 annuity which is binding on the executors.

The language used in this indenture is that of obligation, *i.e.*, "shall pay". The parties clearly thought that the appellant had the right to have set aside a distinct fund to provide her annuity, and she expressly relinquished this right at the request of the executors in return for their undertaking to pay the annuity out of another fund.

The executors had power under The Trustee Act, R.S.O. 1914, ch. 121, sec. 52 (now R.S.O. 1937, ch. 165, sec. 47) to compromise any claim by a legatee or creditor against the estate. Hence, even if the appellant's right to the annuity was doubtful, the executors had power to resolve this doubt by effecting the compromise set out in the 1914 indenture. The onus of proving that the executors had not authority to compromise this claim has not been discharged. Long passage of time raises a presumption in favour of transactions of this character.

If the above claims founded on the 1914 indenture are not upheld, the appellant submits that this indenture amounts to a clear representation by the executors to the appellant that she was entitled to the annuity. The appellant, acting on this representation, did not provide suitably for the future. As a result of all this, the executors should be estopped from now denying the appellant's right to the annuity: *De Tchihatchef v. The Salerni Coupling, Ltd.*, [1932] 1 Ch. 330.

The indenture of 1914 was produced to the Court in 1915, on a petition for compensation on the distribution of the estate, when counsel for all parties were present. The appellant has always been treated as a person with an interest in the estate, having been notified of and represented at various estate proceedings in Court at which her counsel was awarded costs.

The executors and trustees and also the residuary beneficiaries knew of this indenture and have by their conduct over a period of years been guilty of laches and acquiescence, and hence are now debarred from disputing the appellant's right to the annuity.

The trustee owed the son a duty to disclose to him or his wife the fact that it knew the annuity to his wife would be disputed upon the son's death, and the trustee should now be estopped in respect of the residuary shares of which it is trustee or the owner from disputing the appellant's right to the annuity, the son having died intestate.

If the agreement of 1914 should be held to be based on a mistake of law, the appellant submits that it was a mistake of general law as laid down in *Re Coley*, [1903] 2 Ch. 102, and thus the case of *Allcard v. Walker*, [1896] 2 Ch. 369, is not applicable.

The following counsel also appeared but were not called upon:

W. R. Wadsworth, K.C., for J. C. Cartwright, a residuary beneficiary.

J. G. Middleton, for A. G. B. Cameron, a residuary beneficiary.

G. A. Martin, for The Toronto General Trusts Corporation, as trustee of the estate of Alexander Cameron, deceased.

Hamilton Cassels, K.C., for The Toronto General Trusts Corporation, as trustee of the shares of certain beneficiaries.

The oral judgment of the Court was delivered at the conclusion of the argument by MIDDLETON J.A.:—In this case we do not think it necessary to hear counsel for the respondents. All the members of the Court entirely agree with the judgment of Mr. Justice Kelly pronounced at the hearing. He has given very full consideration to everything that has been argued.

The decision of *Re Coley*, *Hollingshead v. Coley*, [1903] 2 Ch. 102, governs the construction of the will. The late Mr. Cameron knew that his son Mr. Alfred Cameron was married at the date of his will and, if it is material, at the date of his death. He gave to Mr. Alfred Cameron an annuity of \$3,000.00 a year and provided that upon his death his wife, if she should survive him, should be paid \$1,000.00 per year.

The testator died in 1893. His son Alfred Cameron survived till 1938. The son's wife lived till 1902. The son remarried in 1904, and his second wife survived him. She claims to be entitled to the legacy.

According to the decision in *Re Coley*, this second wife is not entitled to take unless in the will there is found something

to indicate an intention on the part of the testator. *Prima facie* the wife entitled was the lady known to the testator. Lord Justice Romer thus states the rule: "It is settled that if in a will you find a gift by the testator to the 'wife' of a person and that person has at the time a wife living and acknowledged by the testator, the testator *prima facie* intends to refer to the existing wife and not to any subsequent wife that person may have; unless, indeed, there may be a sufficient context to enable the Court to say that the testator is referring also to a subsequent wife and that the *prima facie* meaning of the gift is displaced."

Mr. Denison has argued with much force that there is in this will sufficient to indicate a contrary intention. We have paid much attention to his argument, but cannot agree with him.

Mr. Denison also referred to the decision of the New Brunswick Court of Appeal in the case of *Wilmot v. DeMill* (1893), 32 N.B.R. 8. That was a decision in 1893 just before the will was executed. The Court differed and the majority upheld a construction by the learned Equity Judge in favour of the widow claimant. That decision was in itself unsatisfactory, and at any rate was ten years before the decision of the Court of Appeal in England. We think we ought to follow the English case in preference to it.

The second point argued was based upon an agreement signed by the widow some years ago. This agreement was in the nature of a release in which she assented to the distribution of the funds of the estate in excess of a sum retained to meet the husband's annuity. This the then trustees of the estate, the husband and his solicitor, promised to pay to her. The question of her right to the annuity was assumed, but, upon the estate passing to the hands of the Toronto General Trusts Company, it looked into the matter and, immediately after her husband's death, advised her that in their opinion she was not entitled to receive the legacy. This agreement is satisfactorily dealt with by the judgment in the Court below, and we do not think it necessary to add anything.

The question of costs remains. We have some sympathy with the widow, who was no doubt misled by the statement signed by her husband and his solicitor. This induces us to depart from

the rule that the costs of an appeal should abide the result even in judgments in will cases. We think that justice will be met here by directing that there should be no costs of this appeal. Mr. Justice Fisher does not agree as to costs. He would allow the costs out of the estate.

Appeal dismissed without costs.

[COURT OF APPEAL.]

Re Lyons-Wright Ltd.

Ex parte The Toronto Harbour Commissioners.

Bankruptcy—Landlord and tenant—Municipal taxation—Bankruptcy of tenant—Tenant's covenant to pay taxes—Disclaimer of lease by trustee in bankruptcy in October, 1938—Subsequent payment by trustee of municipal taxes for whole of 1938—Whether trustee can set off proportion of year's taxes from date of disclaimer to end of year against claim of landlord for rent.

A trustee in bankruptcy of the estate of a tenant cannot set off against the landlord's claim for rent the proportion of municipal land taxes from the date of the disclaimer of the lease by the trustee to the end of the year in a situation where by the lease the tenant had covenanted to pay the taxes and the trustee had paid the whole year's taxes after being served with the statutory notice provided for in sec. 114(11) of The Assessment Act, R.S.O. 1937, ch. 272. As between the landlord and the tenant, the landlord was under no liability to pay the taxes, and there is nothing in The Bankruptcy Act, R.S.C. 1927, ch. 11, which, as to taxes, puts the trustee in any higher position than the tenant; the trustee of the estate of the tenant paid nothing on account of the landlord's debt which the tenant was not bound to pay, and there can be no right of action or set-off available to the trustee.

AN appeal by The Toronto Harbour Commissioners from a decision of the trustee in bankruptcy of the estate of Lyons-Wright Ltd., debtor, disallowing a portion of the appellant's claim.

The appeal was heard by URQUHART J. in Bankruptcy Court at Toronto.

J. M. Bullen, K.C., for The Toronto Harbour Commissioners, appellants.

F. A. Beck, for the trustee, respondent.

October 25th, 1939. URQUHART J.:—This is an appeal by the Toronto Harbour Commissioners from the decision of the trustee disallowing the sum of \$868.73, part of a preferred claim for rent and being a portion of the taxes from the 20th October, 1938, to the end of the year 1938, on certain lands leased by the debtor from the Commissioners.

The trustee paid to the City of Toronto, under pressure, the whole of the taxes on the lands in question for the year 1938 and sought to set off against the landlord's claim for rent the above mentioned sum for that part of the year which followed after the trustee had given up possession of the lands.

Lyons-Wright Limited, the authorized assignor, occupied certain lands in the City of Toronto, under the terms of three leases

dated 4th October, 1935, 23rd February, 1937, and 4th October, 1935, from the Toronto Harbour Commissioners, which would have had several years to run except for circumstances hereinafter set forth. All of the said leases, which may be more fully referred to, contain the following provisions:

"5. Yielding and paying therefor unto the said Lessors their successors and assigns yearly and every year during the said term hereby granted the clear yearly sum of Four Thousand Nine Hundred and Forty-seven Dollars and thirty-two cents (\$4,947.32) in the manner following that is to say—In advance on the first day of September 1936 the sum of Four Hundred and Three Dollars and thirty-one cents (\$403.31) and in advance on each of the First days of October, January, April and July during the balance of the term hereby granted the sum of One Thousand Two Hundred and Thirty-six Dollars and eighty-three cents (\$1,236.83) excepting the last of such payments due on the First day of July 1957 which shall be the sum of Eight hundred and Thirty-three dollars and Fifty-two cents (\$833.52).

"6. The said Lessee covenants and agrees with the said Lessors to pay rent, and to pay taxes, including taxes for Local Improvements and all other rates whether municipal or parliamentary, assessed against the land or buildings thereon or the rents, issues or profits thereof, or any or all of them; and the Lessee will pay all rates, charges and assessments chargeable on account of or in respect of all public services or utilities supplied to the demised premises, which may be or become a lien, charge or encumbrance upon the demised premises; and to repair; and that the said Lessors may enter and view state of repair; and that the said Lessee will repair according to notice in writing; and will not assign or sublet without leave; and will not carry on or permit to be carried on upon the premises any business or occupation which shall be deemed a nuisance; and that it will leave the premises in good repair; Proviso for re-entry by the Lessors on non-payment of rent, or non-performance of covenants.

"7. And the said Lessee covenants with the said Lessors that in case the said Lessee shall make an assignment for the benefit of creditors or shall become bankrupt or insolvent or take the benefit of any Act that may be in force for bankrupt or insolvent debtors or shall commit an Act of Bankruptcy as defined by the

Bankruptcy Act or if the term hereby granted be at any time seized or taken in execution or in attachment, then at the option of the said Lessors this lease shall cease and be void and the term hereby granted expire and be at an end, anything herein to the contrary notwithstanding, and the rent for the then next ensuing three months shall immediately become due and payable and the Lessors may re-enter and take possession of the premises and the term shall be forfeited and void."

On the 20th day of July, 1938, the said company made an authorized assignment in bankruptcy and the Premier Trust Company was duly appointed its trustee. The said leases were duly disclaimed by the trustee as of October 20th, 1938.

Prior to the bankruptcy the City of Toronto had assessed both Lyons-Wright Limited and the Commissioners for real estate taxes on the said lands for the whole of the year 1938. All necessary statutory notices to enforce collection and preserve the city's priority were duly served on the trustee and a proof of debt for the whole year's taxes, claiming the usual preference, was filed with the trustee, which said claim the trustee has allowed in full. The proportionate amount of the real estate taxes for the period October 20th to December 31st, 1938, amounts to \$868.73. The Harbour Commissioners have filed a claim for rent for the period July 20th to October 20th, 1938, claiming the usual preference. The trustee claims the right to set off the said sum of \$868.73 against the said claim for rent. The trustee claims that by law all obligations incurred by the debtor to the landlord, including the obligations in respect of land taxes, were terminated by law as of the 20th day of October, 1938. The Commissioners on the other hand, while admitting that morally and equitably the trustee's contention is the proper one, argue as a matter of law that as the debtor had contracted as part consideration for the leasing of the lands to pay taxes for the year and as these taxes were fully due on the 1st day of January, 1938, and payable in full long before the trustee had relinquished the property and as the debtor was assessed for same, the trustee was merely paying a just debt and if he paid for the whole year he cannot charge back to the Commissioners the proportion of taxes for the two and one-third months which elapsed between the 20th October 1938 and the end of that year.

It would be different, it is argued, if the landlord and not the tenant were obligated by the leases to pay the taxes and the trustee had paid same under pressure, but here the tenant covenanted to pay taxes although the reddendum clause of the lease (Clause 5) contained no reference as to taxes being part of the rental consideration. Reference to *In re Grantham* (1923), 4 C.B.R. 168.

As and from the said date October 20th, 1938, the Harbour Commissioners went into possession of the said lands and leased them to new tenants. As part of the consideration for the occupation by the new tenants, these paid a proportionate amount of the real estate taxes accruing on the lands occupied, on the agreement that the amount so paid would be returned to the said tenants in the event that the Commission was not liable to pay such real estate taxes for the balance of the year and that the trustee was held liable.

It will be noted, however, as above stated, that the City of Toronto assessed both the debtor and the Commissioners for the real estate taxes and therefore both would be legally liable for same. The trustee might have paid to the City the proportion of taxes due up to October 20th, and let the landlord become liable for the balance, thereby shifting the same on to the Commissioners, but unfortunately this course was not open to the trustee by reason of the City having served a notice under section 112 of The Assessment Act which had the effect of creating a lien upon the chattels and moveable assets of the debtor, and therefore in order to effect a sale of these the trustee was forced to pay the whole of the year's taxes for which the debtor and the Commissioners were assessed and which were overdue.

The point is not free from difficulty. The trustee relies upon the case of *Re National Piano Co. Ltd.* (1930), 66 O.L.R. 303. This is a case between the landlord and the trustee where there had been no intervention on the part of the city. Orde J., held that both rent and taxes were apportionable at the date when the trustee gave up possession and that the landlord could not make the tenant pay the balance of the year's taxes, even though the clause having reference to the bankruptcy of the debtor seemed to indicate that this might be the case.

Mr. Bullen argues that in that case, which to my mind is a much stronger case in favour of the contention of the landlord

than the case at bar, there was no question of the trustee having paid a debt which was due by the debtor. It was a question of adjustment between the landlord and trustee. He argued that if, as here, the trustee makes a payment to the City of a debt which was actually owed by the debtor he cannot charge the same back to the trustee. This argument, however, overlooks two elements: the first is, that it was not only the debtor's debt but also the Commissioners' debt, the property having been jointly assessed, and secondly that the payment was secured by pressure which the trustee could not avoid.

I am unable, therefore, to distinguish this case from the *National Piano Company Limited* case and I think that the principles enunciated in that case are applicable to the present case and that the trustee having paid, under the circumstances it did, the taxes, is entitled to charge them against claim of the Commissioners for rent. The Commissioners will not lose by this course because they have already received the balance of taxes subject however to the agreement to return.

The appeal therefore fails and must be dismissed with costs, payable by the Commissioners to the trustee.

The Toronto Harbour Commissioners appealed to the Court of Appeal from the order of Urquhart J.

November 8th, 1939. The appeal was heard by RIDDELL, McTAGUE and GILLANDERS JJ.A.

J. M. Bullen, K.C., for The Toronto Harbour Commissioners, appellants.

F. A. Beck, for the trustee, respondent.

November 25th, 1939. McTAGUE J.A.:—I have had the advantage of reading the reasons for judgment of my brother Gillanders. While I agree in the result and the reasoning, I desire to contribute a brief outline of my own reasons.

The leases were disclaimed by the trustee on the 20th day of October, 1938. Whatever rights the trustee and the Toronto Harbour Commissioners, the lessor, had in respect of the leases crystallized on that date and were governed by the Bankruptcy Act. The taxes in question were assessed against both the debtor and the lessor, and were therefore the direct debt of both to the City of Toronto. As between the debtor and the lessor, the debtor was bound to pay them.

By virtue of sec. 318 of the Municipal Act, R.S.O. 1937, ch. 266, taxes for the whole year were overdue after the 1st January, 1938. No new debt as to taxes arose after the date of disclaimer. As a result of notice under the Assessment Act given by the City, the trustee paid the debt of the debtor owing as of the 1st day of January 1938. As between the lessor and the debtor, the lessor had no liability for that debt, and I can find nothing in the Bankruptcy Act which, as to taxes, puts the trustee in any higher position than the debtor itself. The trustee has paid nothing on account of the lessor's debt which the debtor was not bound to pay, and there can be no right of action or set-off available to him.

For these reasons I agree with my brother Gillanders that the appeal should be allowed with costs.

GILLANDERS J.A.:—This is an appeal by the Toronto Harbour Commissioners from the judgment of the Honourable Mr. Justice Urquhart, dated October 25th, 1939. Subject to what may be stated herein the facts are fully stated in the judgment appealed from and need not be repeated here.

As the learned trial Judge has said, the point is, I think, not free from difficulty. When the leases were disclaimed by the trustee as of October 20th, 1938, and the lessors went into possession of the property, or more properly when the trustees surrendered possession and the lessors accepted and went into possession thereof, the rights of the parties depended on the provisions of the Bankruptcy Act. No question arises about the amount of rent as such for which the lessors are entitled to prove, but the trustee having paid the whole year's taxes after being served with the statutory notice now provided for in subsection 11 of section 114 of The Assessment Act, R.S.O. 1937, chapter 272, claims the right to a set-off against the claim for rent the sum of \$868.73, being the proportionate amount of the real estate taxes on the demised property for the period October 20th to December 31st, 1938, that is from the date of surrender to the end of the term. Is this a claim that the trustee is entitled to so set off?

Section 58 of the Bankruptcy Act provides:

"58. The law of set-off shall apply to all claims made against the estate, and also to all actions instituted by the trustee for the

recovery of debts due the debtor in the same manner and to the same extent as if the debtor were plaintiff or defendant, as the case may be, except in so far as any claim for set-off shall be affected by the provisions of this Act respecting frauds or fraudulent preferences."

Mr. Bullen for the appellants contends that the trustee voluntarily paid the full year's taxes, that the debtor being assessed this was his debt to the municipality, the taxes being overdue and by the terms of the lease the debtor having covenanted with the lessors to pay them no part of such payment can be made the basis of a claim against the lessors and collected by way of set-off.

The case of *Re National Piano Company, Limited* (1930), 66 O.L.R. 303, was discussed by counsel for both parties. The facts in that case should be distinguished from the case at bar. Neither the debtor nor the trustee had paid the taxes to the municipality. It was a claim by the lessor claiming the same priority for taxes as for rent. In the lease in that case it was provided that in the event of bankruptcy the then current month's rent, together with the rent for three months next accruing and taxes for the current year should immediately become due and payable and such taxes should be recoverable by the lessor in the same manner as the rent reserved.

In the case at bar there is a covenant to pay taxes, but no provision that they are to be deemed to be rent, nor that they are recoverable in the same manner as rent. It is said that the taxes were paid under pressure or compulsion by reason of the fact that notice had been given to the trustee by the municipality under section 114, subsection 11 of the Assessment Act, and the trustee then had no option but to pay them in full as provided by the subsection.

However I cannot see how the giving of the notice affected the rights as between the parties before the Court. The notice was properly given by the municipality. The taxes were owing and properly paid. In and by the lease the debtor had covenanted to pay them, and I have difficulty in ascertaining on what grounds the trustee can now recover from the lessor the taxes so paid, or any part of them, by way of set-off or otherwise.

In *In re Bradley, Ex parte Dixon* (1921), 2 C.B.R. 147, it was held by the Registrar, Mr. Holmsted, K.C., that where rent was paid to the landlord for several months in advance, while the

trustee is entitled to have the same credited against his occupation rent, he has no right given him to demand payment of any part of the rent actually paid in advance.

Our attention is called to section 102 of the Assessment Act, which provides as follows:

"102. Any tenant may deduct from his rent any taxes paid by him which as between him and his landlord the latter ought to pay."

This was formerly section 97 of the Assessment Act. It was applied in *Re Grantham, Ex parte Doyle* (1923), 4 C.B.R. 168, but in that case, while both the debtor and the lessor were assessed and the trustee was forced to pay the taxes when a bailiff acting for the municipality distrained while the trustee was holding an auction sale, as between the debtor and the lessor by the lease the lessor was to pay the taxes not the debtor.

This section cannot, I think, aid the trustee here because in and by the lease the debtor undertook to pay the taxes, and it could not be held that as between the debtor and his landlord the latter ought to pay them. It is true the lessor took possession of the premises on surrender and had possession thereof during the period in question, but that does entitle the trustee to repayment of a proportionate amount of the taxes paid which the debtor had undertaken to pay. Had the taxes as between the parties been payable by the lessor, and had they been paid by the debtor or the trustee, then I think the section would apply, but that is not the case here.

In the case at bar the debtor having covenanted to pay the taxes and these being paid by the trustee, I am unable to find any firm foundation upon which the trustee can claim by way of set-off or otherwise, the proportionate amount of taxes here in question.

For these reasons I am of opinion that the appeal should be allowed with costs.

RIDDELL J.A.:—On the conclusion of the argument, I was in great doubt. The careful judgment of Mr. Justice Urquhart deserved every consideration; but on a perusal of authorities and facts, I find myself unable to dissent from the conclusions of my learned brethren.

The appeal therefore will be allowed with costs.

Appeal allowed with costs.

[MACKAY J.]

Abraham v. The New York Cafe et al.

Landlord and tenant—Lease under seal—Defective as a deed—Construed in Equity as a valid agreement for a lease—Authority of an agent to execute lease on behalf of a principal—Ratification—Non-registration of an assignment of a lease—The Registry Act, R.S.O. 1937, ch. 170, secs. 73 and 77.

A document purporting to be a common law lease under seal but which is defective as a common law lease because of a technical irregularity as to execution, will be construed and enforced in Equity as a valid agreement for a lease if the tenant has entered upon the demised premises and has paid rent: *Rogers v. National Drug and Chemical Co.* (1911), 24 O.L.R. 486, applied.

Where a lease or an agreement for a lease for a term of more than seven years has been registered under The Registry Act, R.S.O. 1937, ch. 170, but a subsequent assignment of the lease has not been registered, the assignee does not lose his right to enforce the lease or agreement for a lease as against a subsequent purchaser of the land. The subsequent purchaser, in such a situation, has statutory notice of the burden against the land and the non-registration of the assignment is immaterial: *McLennan v. McDonald* (1871), 18 Gr. 502, considered.

AN action for a declaration as to the possession of land.

The action was tried by MACKAY J., without a jury, at Cornwall.

Rodolphe Danis, K.C., for the plaintiff.

John J. Robinette and *G. A. Stiles, Jr.*, for the defendants.

January 11th, 1940. MACKAY J.:—In this action the plaintiff, as assignee of a head lease, asks for a declaration that she is entitled to the possession of premises on the east side of Pitt Street in the Town of Cornwall, occupied by the defendants and known as the New York Cafe. The defendants deny that the plaintiff is entitled to possession of the premises in question and assert that they, as holders of a sub-lease from prior owners of the head lease, are entitled to possession until the year 1951. The defendants, in addition to denying the plaintiff's right to possession, counterclaimed in the sum of \$5,000.00 for improvements, additions and alterations to the building, made under mistake of title in the event that the plaintiff should be entitled to possession. The plaintiff did not file any reply or defence to the defendants' counterclaim.

The facts are somewhat complicated but may be stated as follows: In the year 1858 the trustees of the Presbyterian Church in the Town of Cornwall leased to Pierrepont Edward Adams and Donald McMillan of the Town of Cornwall, merchants, a block of land on the east side of Pitt Street, in the

Town of Cornwall. The land included in this lease consisted of the lands on which the building now known as the New York Cafe now stands and of adjoining land on which the building known as the old Ottawa Hotel now stands. This lease made in the year 1858 was for fifty years from the 8th of August, 1857, and contained provisions for further renewal. Shortly thereafter Donald McMillan assigned his interest in this lease to his co-tenant, Pierrepont Edward Adams, and thereafter Pierrepont Edward Adams became the sole tenant.

Pierrepont Edward Adams died in the year 1882, and by his last will, which was admitted to probate by the Surrogate Court of the United Counties of Stormont, Dundas and Glengarry on the 2nd day of January, 1883, he devised his leasehold interest in the block of land on the east side of Pitt Street to his brother, Charles P. Adams for his life, and on the death of Charles P. Adams, to four named children of Charles P. Adams, being Mary Ann Adams, Clara Adams, Herbert Adams and Eva Adams, for the terms of their natural lives as tenants in common, and the testator empowered each of the said four last named children to devise and bequeath to any one or more of his or her lawful child or children absolutely the one-fourth share or interest which he or she was to enjoy for life. Charles P. Adams was named executor of the will of Pierrepont Edward Adams. Charles P. Adams has been dead for many years, long before the events in question in this action, and the heirs left Cornwall years ago and apparently live in the Southern portion of the United States. As appears from the evidence, the estate of P. E. Adams was in fact managed by a prominent firm of solicitors in Cornwall, MacLennan, Liddell & Cline (later MacLennan & Cline). This firm managed the properties of the P. E. Adams estate for many years.

The term created by the above-mentioned head lease made in 1858 came to an end in 1907, but from 1907 until the year 1930 when a new lease was made, the P. E. Adams estate was a tenant from year to year, paying the rent to the trustees of the Presbyterian Church in Cornwall. It should be pointed out that the trustees of the Presbyterian Church have always been, since the grant from the Crown, the owners in fee simple of the lands in question and they are to-day still the owners of the fee simple.

On the 16th day of December, 1930, the trustees of the Church executed a new lease in favour of "the Estate of P. E. Adams of the Town of Cornwall" covering the same lands as were mentioned in the original lease of 1858, that is to say, the New York Cafe and the old Ottawa Hotel. The building known as the old Ottawa Hotel and the land covered thereby are not in issue in this action. By the lease of the 16th of December, 1930, the said lands were leased by the trustees of the church to the estate of P. E. Adams for a term of ten years, to be computed from the 1st day of January, 1930, and the said estate by the lease has extensive rights of renewal, and the lease contains provisions for the affixing of the rent on the renewals by appraisers to be named and appointed by the parties to the lease, and presumably the lease will be renewed for at least a further term of ten years from the 1st of January, 1940, because the lessors have not exercised their right under the lease to prevent a further renewal by giving three calendar months' notice before the expiration of the term of ten years created by the lease.

In the year 1934 the representatives in Cornwall of the estate of P. E. Adams negotiated a sale of the said lease of December 16th, 1930, to William H. Gardiner, a resident of the Town of Cornwall. Since there were infants interested in the remainder under the will of P. E. Adams, the transfer of the lease to William H. Gardiner was effected by a vesting order made by the Honourable Mr. Justice McFarland on the 25th day of July, 1934, pursuant to The Settled Estates Act, R.S.O. 1927, ch. 105. By this order the lease of the lands and premises known as the New York Cafe and the old Ottawa Hotel was vested in William H. Gardiner, who paid, subject to adjustments, the sum of \$5,000.00 for the lease.

On the 19th day of January, 1939, William H. Gardiner assigned the head lease of December 16th, 1930, to Barbara Abraham, the plaintiff in this action.

The foregoing is a history of the head lease from the owners of the lands in fee simple and covering both the New York Cafe and the old Ottawa Hotel.

The defendants assert their right to the possession of the building and premises known as the New York Cafe, by virtue of an assignment or a sub-lease, dated August 16th, 1926, from the P. E. Adams estate through the agents of the P. E. Adams estate,

namely Messrs. MacLennan & Cline, solicitors, to one, Peter Wong. The lease of the New York Cafe to Peter Wong is registered in the proper Registry Office and is for a period of twenty-five years from August 16th, 1926. This lease is expressed to have been made, in that portion of the instrument where the parties are usually named, by Messrs. MacLennan & Cline, as agents for the estate of P. E. Adams, lessor, to Peter Wong, lessee. The lease is signed with the name "MacLennan & Cline" and the affidavit of execution asserts that it was executed by Mr. C. H. Cline. At the time this lease was executed the buildings on the property now known as the New York Cafe were not in very good condition and the lease provided that Peter Wong must spend at least \$7,000.00 in improving the premises. The evidence establishes that Peter Wong in fact spent somewhat over \$8,000.00 in construction work on the buildings as follows:

- (1) A stone addition at the back of the then building.
- (2) A further smaller addition at the back of the first addition.
- (3) An entirely new brick front on the building and extensive interior alterations.

Peter Wong went into possession of the premises known as the New York Cafe under his registered sub-lease, and remained in possession until on or about August 23rd, 1929, when he assigned his sub-lease to Bing Chow and six other Chinese. The assignment to Bing Chow and six other Chinese is dated August 23rd, 1929, and is not registered in the Registry Office. Two of the Chinese named as assignees of the sub-lease are still to-day members of the partnership or syndicate and are defendants in this action. The other four Chinese named in the assignment from Peter Wong subsequently transferred their interests in the partnership or syndicate to the defendants other than the two who were named in the assignment of lease. The two who were named as assignees and who are still members of the partnership and are among the defendants in this action are Bing Chow and Yok Hum. Bing Chow is the manager of the syndicate and is the spokesman for the defendants.

Since 1929 Bing Chow and his associates, who carry on business as the New York Cafe, have regularly paid their rent under the sub-lease to the owners of the head lease, and no person can

suggest that throughout the entire matter the Chinese have not acted in perfect good faith. The defendants paid their rent regularly, and they paid a large sum of money for the improvements and additions to the structure on the land. In fact in 1929 when Bing Chow and the others took the assignment of the sub-lease from Peter Wong, they paid to Peter Wong a total of \$15,312.43, which, as explained by Bing Chow, was made up of:

(1) \$7,500.00 for the assignment of the lease, including, of course, the benefit of the investment of over \$8,000.00 made by Peter Wong in improvements.

(2) \$7,500.00 for the good-will of the business and the fixtures.

(3) \$312.43 for the consumable goods on hand, such as cigars, cigarettes, etc.

The assignment by Peter Wong to Bing Chow and the others was executed by Sam Wong and Loo Qnee, as attorneys for Peter Wong under a power of attorney executed by Peter Wong on November 20th, 1928.

On the 7th of March 1939, the plaintiff served on the defendants a notice as follows:

"I hereby give you notice to quit and deliver up the premises which you now hold of me, known as the New York Cafe, situated on Pitt Street, in the Town of Cornwall, on the 1st day of May next."

A further notice was served by the plaintiff on the defendants on the 18th day of May, 1939, in the following words:

"Take notice that I demand from you immediate possession of my premises which you are now occupying, namely, the New York Cafe, situated in the Town of Cornwall, County of Stormont, and bearing municipal number 129 Pitt Street."

I am of opinion that the claim of the plaintiff in this action to obtain possession of the premises occupied by the defendants and to deprive the defendants of their substantial investment in this property is unconscionable because there is no doubt from the evidence of Bing Chow that they acquired the lease from Peter Wong and paid their money to Peter Wong on the strength of the assumption that they could occupy and possess the premises until the year 1951. And there is also no doubt that Peter Wong himself, as his lease provides, made his expenditures of over \$8,000.00, on the buildings on the strength of the fact that

he had a lease for twenty-five years, until 1951. The injustice of the plaintiff's contention is particularly obvious when one considers that by virtue of the lease from the P. E. Adams Estate to Peter Wong, the improvements and additions made by Peter Wong, apart from trade fixtures, are to belong to and become the property of the lessor on the termination of the lease to Peter Wong.

The main question in this action is as to the validity and effect of the sub-lease of the New York Cafe, made by Messrs. MacLennan and Cline on behalf of the P. E. Adams Estate to Peter Wong in 1926.

Counsel for the plaintiff has contended on the following grounds, that the sub-lease in question is of no effect and is void:

(1) Because under sec. 2 of the Statute of Frauds, R.S.O. 1937, ch. 146, it is provided that every lease for more than a term of three years must be by deed signed by the party granting the same or his agent thereunto lawfully authorized by writing, or by act or operation of law. Apparently counsel for the plaintiff suggests that since the sub-lease to Peter Wong was under seal the authority of MacLennan & Cline to act as agents ought likewise to have been under seal, relying on the common law doctrine that the authority to execute a document under seal must be evidenced by some document under seal, and that no such document under seal establishing the authority of MacLennan & Cline was proven at the trial.

(2) Because in 1926 when the sub-lease to Peter Wong was executed on behalf of the P. E. Adams Estate, the P. E. Adams Estate could not give to Peter Wong a lease for twenty-five years when at that time the Adams Estate itself merely had the status of a tenant from year to year of the whole block.

(3) Because the evidence was not sufficient to prove that MacLennan & Cline had in fact the necessary authority from the P. E. Adams Estate to give a lease for twenty-five years.

(4) Because some of the persons interested in the P. E. Adams Estate were infants in 1926 and therefore it was impossible for MacLennan & Cline to obtain the necessary power in any form to give a lease for twenty-five years.

In considering the above contentions of the plaintiff one must keep in mind that, as far as the head lease is concerned, Gardiner could stand in no higher position, as far as his rights were con-

cerned, than the P. E. Adams Estate, because the order made in 1934 vested in Gardiner whatever interest the estate of P. E. Adams had in the head lease, and likewise the plaintiff Abraham can stand in no higher position than Gardiner or the Adams Estate stood. Therefore, if the Adams Estate could not have questioned the lease to Peter Wong, the plaintiff cannot; and even if the Adams Estate could have questioned the lease to Peter Wong, if by ratification, acquiescence or estoppel, Gardiner could not question the lease to Peter Wong, then the plaintiff Abraham cannot question the lease to Peter Wong because Abraham is a simple assignee from Gardiner.

The evidence established that the firm of Messrs. MacLennan, Liddell & Cline, later the firm of MacLennan & Cline, were a very reputable firm of solicitors practising in Cornwall and were considered as one of the two leading firms. Mr. MacLennan, Mr. Liddell and Mr. C. H. Cline, the partners in the firm, are now dead, Mr. C. H. Cline, the last of the members of the firm having died late in the year 1926. After Mr. C. H. Cline's death some of the firm's business, such as the management of the properties of the P. E. Adams Estate was carried on by his brother, Mr. R. S. Cline, who was not a solicitor but who had been a bookkeeper for the firm for some years. Mr. R. S. Cline is also dead, as is also Miss Maude MacLennan, whose name as a witness appeared on some of the documents and who was a daughter of the senior partner of the firm. In fact the whole personnel of the old firm of MacLennan, Liddell & Cline is gone and no direct evidence can be obtained as to their power or authority to act on behalf of the Adams Estate. Moreover, the heirs of P. E. Adams Estate, being the children of his brother, C. P. Adams, left Cornwall several years ago and they are all now resident in the southern part of the United States, one being in Texas and some in California. However, despite the absence of direct evidence as to the authority of Messrs. MacLennan, Liddell & Cline, I am of opinion that the following evidence does establish that MacLennan, Liddell & Cline had the power to manage the properties of the Adams Estate:

(1) The evidence of Mr. A. E. Hall, a solicitor now practising in Cornwall, who looked after the affairs of the P. E. Adams Estate after the death of Mr. R. S. Cline, was to the effect that he

had often advised Mr. R. S. Cline as to matters in connection with the P. E. Adams Estate.

(2) Mr. J. E. Tallen, who, for fourteen years from 1924, was tenant of a store in the old Ottawa Hotel, said that he had a lease from MacLennan & Cline as agents of the P. E. Adams Estate, that he paid the rent to MacLennan & Cline, that he went to them for repairs and that his possession of the store and his lease were never questioned by any member of the Adams family.

(3) Roland Runions, an elderly gentleman, swore that in 1899 Messrs. MacLennan, Liddell & Cline, acting on behalf of the P. E. Adams Estate leased the old Ottawa Hotel to him for several years, that he paid the rent to MacLennan, Liddell & Cline, that he went to them for repairs and that his possession and his lease were never questioned by the Adams Estate.

The Adams heirs at no time questioned the validity of the lease given by MacLennan & Cline to Peter Wong, although the collection of the rent from Peter Wong and the defendants was reported to the Adams heirs by the representative or agent in Cornwall of the estate. This is clear from the evidence of Mr. Hall, who, from 1931 to 1934, managed the property on behalf of the estate, and he swore that the Adams' heirs knew about the lease and that he collected the rent regularly from the Chinese defendants and reported the collection thereof regularly to the Adams Estate. In fact, from the time in 1929 when the defendants went into possession under their assignment from Peter Wong, they have paid their rent and taxes regularly to the respective owners of the head lease, and neither the Adams heirs nor any of the agents acting for the Adams Estate in Cornwall, nor the subsequent assignee of the head lease, W. H. Gardiner, questioned in any way the validity of the twenty-five years lease held by the Chinese. In fact, as admitted by counsel for the plaintiff, it was not until the plaintiff acquired the head lease in 1939 that there was any suggestion as to the invalidity of the lease to Peter Wong, through which the defendants claim.

I am of opinion that if the lease to Peter Wong is void as a common law lease, either because it does not comply with sec. 2 of The Statute of Frauds or because the authority of MacLennan & Cline cannot now be established by a document under seal, nevertheless the rule of equity is that if a tenant enters on the property and pays rent pursuant to a lease void as a common

law lease, because of some defect in execution, the void lease in law will be considered as a valid agreement for a lease so that in equity the relationship is really that of landlord and tenant. In support of the foregoing proposition, see Halsbury, 2nd ed., Vol. XX, the article on Landlord and Tenant, at p. 59:

“A lease for a term exceeding three years . . . if created otherwise than by deed is construed as an agreement for a lease and specific performance of the agreement will be ordered provided that it is in other respects capable of this remedy; and where the lessee has entered, the right to specific performance, is sufficient to give the parties respectively rights equivalent to the legal rights and place them under obligations equivalent to the legal obligations of lessor and lessee.

“In equity the lease is deemed to have been effectively granted, and for practical purposes the parties are in the same position as if the lease were valid at law. (See *Walsh v. Lonsdale* (1882), 21 Ch. D. 9).

“Where the above equitable doctrine does not apply, the fact of entry under the void lease if followed by payment of rent is to create a tenancy from year to year upon the terms of the instrument so far as is applicable to such a tenancy.”

The above principles were recognized and applied by Garrow J.A., in *Rogers v. National Drug and Chemical Company* (1911), 24 O.L.R. 486, where he said:

“Prior to the Statute of Frauds, a demise for a term of years by parol was perfectly lawful. That statute made a writing necessary and a subsequent statute required the writing to be under seal. If, however, at law, possession had been taken under the parol demise, and rent paid, the tenant was regarded as a tenant, not at will merely, as described in the Statute of Frauds, but as a tenant from year to year, upon the terms contained in the writing, so far as appropriate to such a tenancy; while in equity his rights were much larger, for there the Courts would in a proper case decree specific performance, treating the parol demise, if otherwise sufficient, as an agreement for a lease, with the result that the parties were regarded in equity as landlord and tenant from the time possession was taken.”

Applying the above principles to the present case I am of opinion that Peter Wong and the defendants claiming through him have a valid agreement for a lease for twenty-five years,

which, as far as equity is concerned, placed the parties in the same position as if there had been a valid lease at common law. We have in this case the essential elements of possession, plus payment of rent, plus a document said to be technically void at common law because of a defect in the form of execution. Of course, to establish the validity of the document as an agreement for a lease, it is necessary for the defendants to show that Messrs. MacLennan & Cline had the necessary power and authority to make an agreement for lease for twenty-five years, and such authority may be established (a) by evidence of antecedent authority from the Adams' heirs, which I find existed on the basis of the evidence stated above, or (b) by proof that the conduct of MacLennan & Cline, in agreeing to give a sub-lease for twenty-five years, was ratified by the Adams' heirs or by Gardiner, who subsequently stood from 1934 to 1939 in the shoes of the Adams Estate.

Even apart from the equitable principle discussed above and putting the defendants' case solely on common law grounds and assuming the sub-lease to be void at common law, the defendants, having entered under a void lease and having paid rent, are tenants from year to year on the terms so far as they can be made applicable of the void lease. In other words, in the present case the defendants are tenants from year to year, from the date of the original sub-lease to Peter Wong, i.e., from the 16th of August, 1926. Therefore, the defendants are tenants from year to year from the 16th of August of one year to the 16th August in the next year, and so on from year to year until their tenancy is properly terminated by adequate notice. A tenancy from year to year can only be properly terminated by full six months' notice directed to the end of one of the yearly periods or, in other words, in this case, there must be six months' clear notice given in a certain year prior to the 16th of August of that year. For the authority that a six months' full notice is necessary to determine a tenancy from year to year, see Williams on Landlord and Tenant, 2nd ed., pages 484 and 485. In the present case the first notice given by the plaintiff to the defendants was on March 7th, 1939, telling them to leave on the 1st of May, 1939. This was not six months' notice prior to August 16th, 1939, and consequently the plaintiff, even at common law, has no right at the present time to the possession of the premises.

However, the defendants rely principally on their position in equity that they have a good agreement for a lease entitling them to possession until 1951.

Even if the antecedent authority of MacLennan & Cline to make an agreement for a lease for twenty-five years on behalf of the Adams Estate was not established, I am inclined to the opinion that the execution of the lease to Peter Wong on behalf of the Adams Estate was ratified by the Adams' heirs and subsequently by Gardiner by virtue of their silence and acceptance of rent from the Chinese, amounting to acquiescence in the whole transaction.

The general principle of ratification of an agent's acts is discussed in Halsbury, 2nd ed., vol. 1, the article on Agency, at pages 235 and 236:

"A ratification may be by parol or be implied from conduct. Even in the case of a written contract which is unenforceable unless evidenced by a note or memorandum in writing, it is not necessary that the ratification should be in writing. . . . While a ratification must be clear and must bear distinct reference to the facts of the particular case, it need not necessarily be approved by positive acts of adoption. In certain cases it is sufficient evidence of ratification that the intended principal, having all material facts brought to his knowledge and knowing that he is being regarded as having accepted the position of principal, takes no steps to disown that character within a reasonable time, or adopts no means of asserting his rights at the earliest period possible. . . . Acquiescence is stronger evidence of ratification where the relationship of principal and agent previously existed between the parties and the act to be ratified was rather one in excess of the agent's authority than one which was totally unauthorized." See to the same effect Bowstead on Agency, Article 29, p. 59.

Applying the above principle to the facts of this case, the Adams' heirs by their silence ratified the agreement for the lease to Peter Wong. Even if the Adams' heirs had not ratified the agreement for a lease by their silence and acquiescence, certainly Gardiner, who acquired all the interest of the Adams Estate and thereby by assignment became the principal in the transaction and who by virtue of the registration of the lease to Peter Wong had full notice and knowledge of the terms of the said

lease, by his silence and acquiescence and acceptance of the rents ratified what had been done by MacLennan & Cline purporting to act on behalf of the Adams Estate.

The plaintiff's counsel contends that the conduct of MacLennan & Cline could not have been ratified by the Adams Estate because there were infants interested in the Adams Estate in 1926, when the sub-lease to Peter Wong was made.

There are two answers to this contention:

1. In 1926, under the will of Pierrepont Edward Adams, the leasehold interest of the late Pierrepont Edward Adams belonged to the living children of C. P. Adams, as life tenants, with remainder to the grandchildren of C. P. Adams. In 1926, as appears from the papers filed on the application before Mr. Justice McFarland in 1934, some at least of the life tenants were alive and were adults and were capable of ratifying the acts of MacLennan & Cline. Each of the life tenants is, of course, entitled to possession of the whole, and each life tenant was capable of conferring his right to possession on the Chinese for such length of time as he lived. Therefore, the life tenants were in law quite capable of ratifying the acts of MacLennan & Cline in giving possession to the Chinese under the lease. If A. is a life tenant of property, he may lease his property to B. for twenty-five years, and the lease is a perfectly valid lease for such length of time up to twenty-five years as the tenant for life lives. Therefore, the tenants for life, or some of them, being alive in 1926 and in 1934, no question of ratification by an infant arises.

2. In 1934, by the vesting order of the Honourable Mr. Justice McFarland, the entire interest of the Adams Estate, both of adults and infants in the head lease was vested in Gardiner. Thereupon Gardiner, with full legal knowledge of the facts, accepted the rent and did not question the lease to the Chinese for five years. Gardiner acquired the infants' interest in the lease as well as the adults' interest and he ratified and acquiesced in what had been done by MacLennan & Cline, and the plaintiff Abraham, having acquired the head lease from Gardiner is in no better position than Gardiner, and she, like Gardiner, cannot now question the validity of the lease to the Chinese.

Moreover what had been done by MacLennan & Cline was subsequently ratified by the interested parties in that the vesting

order of 1934 operated as an assignment from the Adams Estate to Gardiner of the benefit of the lease to Peter Wong and of the covenants given by Peter Wong contained therein, and, of course, the assignment in 1939 by Gardiner to Abraham, conferred upon Abraham the right if he so desired to enforce the covenants in the sub-lease to the Chinese. In *Thompson v. Hickman*, [1907] 1 Ch. 551, it was held that the assignment of an unauthorized agreement constituted a ratification thereof, and it may be argued in the present case that this principle applies here. It is to be observed that when the vesting order of 1934 was made, although all parties consented or were represented by counsel before the Court, no one at that time suggested that the lease to the Chinese was ineffective.

Counsel for the plaintiff also argued that since the Adams Estate in the year 1926 were only tenants from year to year, they could not give Peter Wong a sub-lease for twenty-five years, but the simple answer to this is that in 1930 the Adams Estate did acquire from the trustees of the Church a lease for ten years with right of renewal. The Adams Estate and those claiming through the Adams Estate are estopped from asserting that the benefit from the lease which they acquired in 1930 did not pass to Peter Wong as far as the premises known as the New York Cafe are concerned. At common law Peter Wong and the defendants would obtain the benefit of the 1930 lease by virtue of the doctrine of estoppel by deed or by acts: See Williams on Landlord and Tenant (2nd ed.) pages 40 and 41 and article by Hon. Mr. Justice Riddell on Estates by Estoppel in 11 C.E.D. (Ont.), 602; in Equity the same result is achieved by specific performance of contracts in relation to after acquired property.

The plaintiff is not in a position to take advantage of section 4 of the Statute of Frauds for the following reasons:

(a) The lease from the P. E. Adams Estate to Peter Wong is a good memorandum within the meaning of section 4 of the Statute of Frauds and under this section the authority of an agent to sign the memorandum need not be in writing, but may be established by the rules of the common law, including the doctrine of ratification: *McLean v. Dunn and Watkins* (1828), 4 Bingham 722, per Best C.J.

(b) There was part performance by Peter Wong by the taking of possession of the premises, plus the payment of rent, plus

the making of substantial improvements to the property consistent only with some contract relating to the premises.

(c) The defendant is not suing upon the lease or agreement for lease to Peter Wong, but is raising the same only by way of defence, and section 4 of the Statute of Frauds does not apply where a contract is raised as a defence to an action: *Frith v. Alliance Investment Co.* (1914), 49 S.C.R. 384.

The plaintiff's counsel suggested that the assignment of the sub-lease in 1929 from Peter Wong to the defendants is void because it is not registered in the Registry Office, even though the sub-lease itself was properly registered in 1926. There are two separate answers to this contention:

1. Under section 73 of The Registry Act, R.S.O. 1937, ch. 170, the non-registration of an instrument renders that instrument void only as against a subsequent purchaser for value without notice. The plaintiff did not establish that she was a purchaser for value without notice of the assignment, and in order to claim the protection of The Registry Act the onus was upon her of establishing her position as such a purchaser within the meaning of section 73: *Falconbridge on Mortgages*, Second Edition, page 96.

2. The non-registration of an assignment of a registered mortgage or an assignment of a registered lease does not render such assignment null and void against a subsequent purchaser. The subsequent purchaser, if the original lease or mortgage is registered, has full and complete notice of the burden against the land and it is not material that the benefit of the burden has been assigned to someone else. As long as the original lease is registered, as it was in this case, the non-registration of the assignment is immaterial. In *McLennan v. McDonald* (1871), 18 Gr. 502, it was held that a person is not a purchaser without notice if he has knowledge of a mortgage on lands which he has purchased, but does not know the name of the mortgagee. Here, by virtue of section 77 of The Registry Act, the plaintiff had notice of the sub-lease to Peter Wong, and she did not become a purchaser without notice merely because the identity or name of the present holder of the sub-lease may have been unknown to her.

The plaintiff's counsel suggested in his argument in reply that some of the assignees from Peter Wong of the sub-lease had assigned their interest in the sub-lease to some of the defendants

without the consent of the predecessors in title of the plaintiff to the head lease and that thus there had been a violation of the covenant not to assign or sub-let without leave contained in the sub-lease to Peter Wong. There are several answers to this contention:

(a) Some of the original assignees from Peter Wong of the sub-lease did transfer and assign their interest in the New York Cafe to certain of the defendants and the latter were let into possession of the premises along with the remaining defendants, but there is no evidence that the sub-lease itself was assigned. The mere letting of persons into possession is not a breach of the covenant not to assign or sub-let without leave; Williams on Landlord and Tenant, Second Edition, Pages 651 and 653.

(b) Some of the original assignees from Peter Wong are defendants in this action and are still in possession, and as far as they are concerned there has been no breach of the covenant not to assign or sub-let without leave, and as long as some of the defendants are entitled to possession the plaintiff cannot succeed in her action.

(c) The plaintiff, prior to action brought, did not serve upon the defendants the statutory notice referred to in section 18(2) of The Landlord and Tenant Act, R.S.O. 1937, ch. 219, which provides that a right of re-entry or forfeiture for breach of any covenant or condition in a lease shall not be enforceable by action, entry or otherwise until the lessor serves on the lessee a notice specifying the particular breach complained of.

(d) The predecessors in title of the plaintiff and the plaintiff waived any right to claim forfeiture of the sub-lease on this ground by the acceptance of rent from the defendants. In the statement of claim the plaintiff admits that she has received rent from the defendants; and see Williams on Landlord and Tenant, Second Edition, at page 456.

Where the evidence of the witnesses for the defendants is in conflict with the evidence of the plaintiff's witnesses, I prefer to accept the evidence of the witnesses for the defendants.

I find, therefore, that the defendants, in equity, have a good agreement for a lease entitling them to possession until 1951.

The action should be dismissed with costs.

Action dismissed with costs.

[COURT OF APPEAL.]

Re Bell.

Ex parte Sabiston-Hughes Ltd.

Evidence—Corroboration—Claim of creditor against estate of deceased person—Claim of corporate creditor proven by evidence of a servant of the corporate creditor—Whether corroboration of servant's evidence necessary—The Evidence Act, R.S.O. 1937, ch. 119, sec. 11.

Where the claim of a corporate creditor of a deceased person is proven by the evidence of a servant of the corporate creditor, the evidence of the servant need not be corroborated under sec. 11 of The Evidence Act, R.S.O. 1937, ch. 119, since the servant is not "an opposite or interested party" within the meaning of sec. 11.

AN appeal by the executors of the estate of C. Powell Bell, deceased, and by The Official Guardian from an order of Makins J. allowing an appeal by Sabiston-Hughes Ltd. from an order of His Honour Judge Cochrane, of the Surrogate Court of the County of Peel, disallowing a claim of Sabiston-Hughes Ltd. as a creditor of the estate of the deceased.

December 4th, 1934. The appeal was heard by RIDDELL, MASTEN and FISHER JJ.A.

W. Judson, for the executors of the estate of C. Powell Bell, deceased, appellants.

E. M. Henry, for The Official Guardian, appellant.

Peter White, K.C., and *Grant Gordon*, for Sabiston-Hughes Ltd., respondent.

December 15th, 1939. MASTEN J.A.—This is an appeal by the executors and by the Official Guardian from a judgment of Makins J., dated the 4th October, 1939.

The appeal arises out of the claim made by the respondent against the estate of the appellant, in respect to a money claim of \$2,500.00 alleged to be the purchase price of 12,500 shares of Cache Lake Chibougamau Mines Limited.

The respondent made claim against the estate, which claim was disputed by the executors, whereupon an appointment was obtained from the Judge of the Surrogate Court of the County of Peel, and the claim of the respondent was tried on oral testimony before His Honour Judge Cochrane, the Presiding Judge in the Surrogate Court.

The trial Judge, by a judgment dated the 31st May, 1939, disallowed the claim on the ground that there was no corroboration of the evidence given on behalf of the claimant company.

The respondent thereupon appealed to a Judge of the Supreme Court sitting in Weekly Court, and the appeal was allowed by Makins J., on the 4th October, 1939, who directed judgment to be entered for the amount of the claim with costs.

The present appeal is based on two grounds: First, that in the circumstances here shewn corroboration is required by section 11 of The Evidence Act, R.S.O. ch. 119, of the evidence of one Jones, an employee of the claimant company, whereby the respondent sought to establish its claim, and that there is no corroborative evidence; second, that the contract for the purchase of the shares in question as entered into by the deceased, was and is unenforceable being in contravention of the regulations passed under the provisions of The Securities Act then in force.

I agree with my Lord, the Acting Chief Justice, that on the interpretation of section 11 of The Evidence Act, corroboration is not necessary and that the evidence of Jones, being believed by the trial Judge, affords adequate proof of the claim. I prefer, however, to base my conclusion on the words of the Statute rather than on the doctrine of *stare decisis*.

The words of the section read as follows:

“In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment, or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.”

By the words of the Statute, the only person whose evidence must be corroborated is “an opposite or interested party.” The Statute does not refer to an interested person, and in the present case the witness Jones was in no sense a party to the proceeding, nor in a technical sense interested in the claim, though he may have been an interested person.

The cases relied upon by the respondent were as follows: *Watson v. Severn* (1881), 6 O.A.R. 559; *Teasdale v. Sun Life* (1926), 60 O.L.R. 201 and *Imperial Bank v. Trusts and Guarantee*, [1921] 1 W.W.R. 801.

In my opinion none of these is binding upon this Court. It goes without saying that the decision of a single Judge, however eminent, is not binding on this Court of Appeal and that a deci-

sion of the Appellate Court of Alberta is not binding on this Court, though entitled to the highest respect.

With respect to the case of *Watson v. Severn*, I remain of the opinion that I expressed at the time of the argument, that the views there expressed are *obiter*. I agree with the reasoning in all three of these cases, and would therefore decline to allow the appeal so far as corroboration is concerned.

With respect to the second ground of appeal the circumstances are somewhat peculiar. The judgment of the learned Surrogate Judge on that question, after referring to section 35 of The Securities Act, R.S.O. 1937, ch. 265, and to the different regulations which were passed in pursuance of the Act, quotes the words of the Statute as follows:

"All such regulations and any amendment, alteration or repeal thereof shall become effective in all respects as if enacted under this Act upon the publication thereof in the Ontario Gazette."

He thereupon continues his reasons for judgment as follows:

"Because of some departmental error or oversight these regulations were never published as required by the Act, and were therefore not in effect at the time when the transaction in question took place. The cross-examination of counsel for the Executors was directed solely to the regulations passed under the 1937 Act, on the quite proper assumption that they were in full force and effect. Counsel now relies on the regulations passed pursuant to the 1930 Act, but unfortunately there was no cross-examination of the witness Jones as to whether he complied with these regulations. These regulations require, among other things, that a prospectus be delivered to the person with whom a transaction is to be made. Mr. Jones said that he had the prospectus and showed it to Mr. Bell. There are other regulations in the 1930 Act to be complied with but there is no evidence to show whether the regulations were or were not complied with. If the regulations passed under the 1930 Act were in force at the time of the sale to Mr. Powell Bell, it would, of course, be necessary for the claimant company to comply with these regulations. I am not sure that these regulations were in effect at that time, but in any event the onus is on the executors to prove any defence which they may raise and this being so, they must prove non-compliance with the regulations and they have not done so.

In my opinion this defence to the claim would, under the circumstances, fail, but in view of the position which I have taken on the question of corroboration, the discussion of this defence is perhaps academic. The point was however raised and because of the possibility of appeal it should, I think, be dealt with by me."

As the first ground put forward by the appellants fails, it becomes of importance that this second ground should be carefully considered.

The evidence appears to make it plain that the deceased in his lifetime, so far from repudiating the purchase, approbated it, at a time when the respondent was willing to cancel or modify it. Now the situation is reversed, and the respondent is unwilling to cancel the purchase, while the appellants desire to set up the invalidity of the contract, and to prove that at the time of the contract Regulation 24 was in full force and effect and rendered this executory contract invalid.

As pointed out by my Lord the Acting Chief Justice, the cases cited by him make it plain that if Regulation 24 was in force at the time of the contract, and its provisions were violated, it necessitates a voiding of the contract. I am unable, however, to apprehend how the acts of its testator preclude the respondent from now setting up The Securities Act and regulations as invalidating the contract in question nor how estoppel is applicable.

No binding contract for extension of time or for payment by instalments was ever made by the respondent company. So far as the evidence goes Jones had no power to make a binding contract for an extension of time or that payments should be made by instalments. Even if he had authority, no contract binding the respondent company was made and its position was not altered in consequence of the refusal of the deceased to cancel the contract.

The right of the appellants now to set up in defence the provisions of The Securities Act remains in my opinion unimpaired and it was the duty of the appellants to set it up. It is plain, however, from the judgment of the learned Surrogate Court Judge that Regulation 24 was not before the Court, and that no cross-examination took place upon it in regard to its applicability or effect. I think, however, that the failure to bring it properly before the attention of the trial Judge was, in the

circumstances, in the nature of a slip from which the appellants ought to be relieved on proper terms.

I would therefore direct that, upon payment of costs thrown away in consequence of the former trial, and of the present appeal within fifteen days, the order herein appealed from be set aside, and a new trial directed before the Surrogate Judge.

FISHER J.A. agreed with MASTEN J.A.

RIDDELL J.A. (dissenting in the result):—On the death of Charles Powell Bell, his estate was to be administered by his executors; Sabiston-Hughes Limited, a company dealing in stocks, made a claim for the sum of \$2,500.00, alleging a contract by the testator whereby he purchased 12,500 shares of Lake Chibougamau Mines Limited from them at 20 cents a share.

The matter being brought before His Honour Judge Cochrane of the Surrogate Court of the County of Peel, an employee of the claimants, Clarkson Jones, gave very clear evidence of the sale, and was apparently believed by the learned Judge. But he considered that he was precluded from allowing the claim by the provisions of R.S.O. 1937, ch. 119, sec. 11 which requires corroboration in such cases. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

An appeal was heard by Mr. Justice Makins, who, October 4th, 1939, allowed the appeal, holding, *inter alia*, that no corroboration was necessary. The appeal now comes before us on two grounds, that (1) corroboration was necessary and (2) the non-compliance with the Regulations in such case made and provided under legislative authority.

I think that the judgment was right in respect of the necessity of corroboration. In *Teasdall v. Sun Life Assurance Co. of Canada* (1926), 60 O.L.R. 201, the question as to the necessity of corroboration of the evidence of an officer of an incorporated company came squarely up, and it was necessary, for the determination of the appeal, to decide the question. The Court at p. 207 says "Boucher gives an account of the facts; he is an officer of the defendants; and . . . the case does not fall within the Evidence

Act, R.S.O. 1914, ch. 76, sec. 17, he not being 'an opposite or interested party' *Watson v. Severn* (1881), 6 O.A.R. 559 . . ." This was not *obiter*, it was necessary for the decision of the appeal—nor was it the opinion of a single Judge—it was the opinion, the judgment of the full Court. We are bound by this decision; *stare decisis* is as potent a maxim as it ever has been. It is satisfactory that the only other reported case in Canada, *Imperial Bank v. Trusts and Guarantee Co. Limited*, [1921] 1 W.W.R. 501, in the Court of Appeal of Alberta, lays down the same principle.

I do not think it of advantage to consider what may be called corroboration having a binding judgment to look to.

The other objection to the allowance of the claim stands on a different footing. The Securities Act, R.S.O. 1937, ch. 265 provides for the creation of a Commission, which may make regulations, etc., for what is to be done by the vendor in such a sale as that now in question. These were, sec. 35, to become effective upon their publication in the *Ontario Gazette*; but as they had not been gazetted until May, 1939, and so were not in effect when the sale took place, the Surrogate Judge thought he could not give effect to them. I think that he was right—the provision that upon such publication, the regulations shall become effective in all respects as if enacted in the Act cannot mean to make these regulations retroactive, leading as it does to the absurdity of requiring a vendor to obey regulations not yet effective.

But it will be contended that the Regulations of 1933 were in effect at the time—they are to be found in The Ontario Gazette of 1933 at p. 649. There is no pretence that these or other Regulations were complied with by the vendor, and it cannot be doubted that the violation of the Regulations would be a sufficient ground for voiding the contract: 7 Halsbury (2nd ed.), p. 165; *Anderson v. Daniel*, [1924] 1 K.B. 138; *Lumley v. Broadway etc.*, [1935] O.R. 278. This, however, must be at the instance of the party for whose benefit the Regulation was made, i.e., the purchaser.

The purchaser did not call the deal off, but on the contrary, acted in a manner that was consistent only with the binding nature of the contract, as did the vendor. He was seen by the agent who sold him the stock and was made an offer that the sale

might be cancelled; but this he declined—he had conversations over the telephone, and arrangements for payment were discussed—he promised to send a cheque, &c., &c.

I am of the opinion that the conduct of the purchaser created an estoppel. If it be said that he was ignorant of his rights, I apply the words of Mr. Justice Willis, in *King v. Shipley* (1784), 3 Doug. 177, “every man (who is of sufficient understanding to be responsible for his actions) is supposed to be cognizant of the law as it is the rule by which every subject of the kingdom is to be governed, and therefore it is his business to know it.”

I think the appeal should be dismissed with costs.

I do not agree that there should be a second trial—*interest reipublicae ut sit finis litium*—and it was the duty of the parties to bring all relevant facts and legislation before the Court at the hearing.

New trial ordered on terms, RIDDELL J.A., dissenting.

[COURT OF APPEAL.]

Re Bouscadillac Gold Mines Ltd. and The City of Toronto.

Assessment and taxation—Municipal income tax—Meaning of “income” as defined by sec. 1(f) of The Assessment Act, R.S.O. 1937, ch. 272—Mining company—Interest on moneys of mining company deposited in trust company—Whether whole interest taxable as income or whether allowance should be made by way of deduction therefrom of company’s expenses of operation.

The appellant mining company, not being assessed for or liable to business assessment under sec. 8 of The Assessment Act, R.S.O. 1937, ch. 272, was under sec. 9 of the Act liable to be assessed in respect of income. The appellant company was in the throes of development and having raised by the sale of shares a sum of money for development purposes temporarily deposited the sum raised in a trust company. The moneys so deposited earned interest and the question raised on the appeal was whether or not, in the circumstances, the taxable income of the company within the meaning of sec. 1(f) of the Act should be determined by charging the full amount received by way of interest on the unexpended capital of the company, and in not allowing any deduction therefrom for any of the expenses of operating the company.

Sec. 1(f) of The Assessment Act reads as follows: “‘Income’ shall mean the profit or gain directly or indirectly received by a corporation from its business or undertaking, and shall include interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and also profit or gain from any other source.”

Held by the majority of the Court, Riddell J.A. dissenting, that what is intended to be taxed is profit or gain which can only be ascertained by setting against the receipts the expenditures to which they have given rise. The moneys deposited with the trust company were, under the circumstances, employed in the business of the company and

were part of its undertaking, and in determining the company's taxable income, if any, there should be set off against the interest received from such moneys the expenses properly allowable for operating the company during the tax period in question.

AN appeal by Bouscadillac Gold Mines Ltd., by way of a special case stated pursuant to sec. 85 of The Assessment Act, R.S.O. 1937, ch. 272, from an order of His Honour Judge Parker, of the County Court of the County of York.

The special case is set out in full in the reasons for judgment of GILLANDERS J.A. (*infra*).

November 8th and 9th, 1939. The appeal was heard by RIDDELL, McTAGUE and GILLANDERS JJ.A.

R. F. Wilson, for Bouscadillac Gold Mines Ltd., appellant.

J. P. Kent, K.C., for The City of Toronto, respondent.

November 24th, 1939. GILLANDERS J.A.:—This is an appeal by way of special case pursuant to section 85 of the Assessment Act.

The facts, the question involved, and the opinion of the learned County Judge are fully and clearly stated in the special case as follows:

"Facts: The appellant is a corporation incorporated under Part XI of The Ontario Companies Act for the following objects, namely;

(a) To acquire, own, lease, prospect for, open, explore, develop, work, improve, maintain and manage mines and mineral lands and deposits and to dig for, raise, crush, wash, smelt, assay, analyse, reduce, amalgamate, refine, pipe, convey and otherwise treat ores, metals and minerals, whether belonging to the Company or not, and to render the same merchantable and to sell or otherwise dispose of the same or any part thereof or interest therein; and

(b) To take, acquire and hold as consideration for ores, metals or minerals sold or otherwise dispose of or for goods supplied or for work done by contract or otherwise, shares, debentures or other securities of or in any other company, having objects similar in whole or in part to those of the Company hereby incorporated and to sell and otherwise dispose of the same.

"In the year 1936, the Company embarked on a programme of development of its mining properties and for the purpose of obtaining finances for the completion of its programme, disposed

of shares of its capital stock, realizing from the sale thereof \$182,500.00, expending during the same period the sum of approximately \$75,000.00. In the year 1937 further sales of stock realized the sum of \$67,550.00, and approximately \$81,000.00, was expended in the development of its properties.

"Pending the expenditure of the monies raised from the sale of this capital stock, the directors of the Company placed them on deposit in an incorporated Trust Company and during the year 1937 received on account of interest on the capital on deposit, the sum of \$2,292.79.

"The Head Office of the Company is located in the City of Toronto in office space assessed to the Company's solicitors, and the Company does not appear on the assessment roll of the City of Toronto other than in respect of the assessment in respect of income forming the subject matter of this appeal.

"During the year 1937, the expenses of operating the Company, other than monies expended in the development of its properties, amounted to \$8,003.95, which amount was made up as follows:

Organization Expenses	\$ 465.50
Directors' Fees	331.64
Interest and Exchange	34.66
Legal and Audit	1,009.20
Printing and Stationery	6.02
Postage	6.00
Salaries	1,350.00
Sundry Expenses	716.60
Telephone and Telegraph	15.01
Transfer Fees	1,484.91
Taxes	600.05
Fire Insurance	1,984.36
	<hr/>
	\$8,003.95

"The whole income, except a small item of \$6.43, was derived from interest on money on deposit with the said Trust Company and amounted to \$2,292.79. I held that the said amount of interest was assessable income after allowing the statutory deduction of \$1,500.00, and the assessment was therefore fixed by me at

\$792.79. I did not allow the contention of the Company that the amount of its expenses of operation should be deducted from the amount received as interest in determining the amount of taxable income.

“My reason for so holding is that the appellant company is not occupying land for the purpose of carrying on its business in Toronto, and is, therefore, not liable to business assessment. Such a company, by the provisions of section 9, sub-section 1, paragraph (a) of the Assessment Act, is assessable in respect of its full income. In any case, the income received by it from the trust company as interest on money deposited is income not derived from the business in respect of which the appellant company would be assessable under section 8 of the Assessment Act.

Statement of Question: “On the above facts and on the true construction of the statutes, particularly section 9 of the Assessment Act, as applied to the facts so stated, was I right in holding that the Company was assessable in respect of the income of the Company received by way of interest upon unexpended capital of the Company on deposit pending expenditure for the objects of the Company, and in not allowing any deduction therefrom for any of the Company’s expenses of operation?”

It is admitted by counsel that the appellant company, not being assessed for or liable to business assessment under section 8 of the Assessment Act, is under section 9 of that Act liable to be assessed in respect of income. The question for determination is whether or not, in the circumstances, the income is to be determined by charging the full amount received by way of interest on the unexpended capital of the Company and in not allowing any deduction therefrom for any of the expenses of operation.

This question involves the construction of section 1(f) of the Assessment Act defining “income”, which reads as follows:

“‘Income’ shall mean the profit or gain directly or indirectly received by a corporation from its business or undertaking, and shall include interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and also profit or gain from any other source.”

Counsel for the appellant submits that in arriving at the income, we must keep in mind that it means “profit or gain

received directly or indirectly from the business or undertaking" of the Company, and that in arriving at such profit or gain, while "interest . . . received from money at interest or from stocks or from any other investment" is to be included, that this is only a factor in determining whether or not there is profit or gain, and further that the moneys here on deposit under the circumstances of this case, the Company being in the throes of development, were employed in its business or undertaking, and were not in the nature of an investment apart from the business of the Company.

On the other hand counsel for the respondent City Corporation submits that in ascertaining the income here, the Company was not engaged in the mining operations for which it was incorporated; that there is no profit or gain from its business or undertaking, but the interest from the moneys on deposit with the Trust Company has no relation to whether or not there was profit or gain from the business or undertaking, but must be assessed (subject to the statutory deductions) as income. He submits that the expenditures claimed were not made to earn the interest received from the moneys on deposit, and that this money is not in use in the business or undertaking of the Company, but is in the nature of an investment, the interest from which is assessable as income under the definition in the Act.

Several cases were cited and discussed, none of which decides the exact point here under discussion.

In *City of Toronto and John Northway & Son Limited* (1923), 54 O.L.R. 81, although the definition of "income" was slightly different in form from that in the present Act, for the purposes of this case there is no essential difference. In that case the Company was liable for a business assessment and under the Act was also liable in respect of any income not derived from the business in respect of which it was assessable "in addition to the business assessment."

It was there held that, the Company being engaged in the business of making and selling clothing, and not of saving and trading in money, the income from certain investments which had been taken out of the business and were not used in the business, was liable to assessment.

In *Re City of Toronto and G. T. Fulford Co. Limited* (1922), 22 O.W.N. p. 50, was a decision of the Municipal Board respecting

the assessment of several items received by the appellant Company. The case is not of assistance here except as indicative of what income should and should not be viewed as derived from the business of the Company.

In *Wallace Realty Co. Limited v. Corporation of the City of Ottawa*, [1930] S.C.R. 387, the main question involved was whether or not the appellant company was entitled to claim exemption, by way of deduction from its gross revenue derived from stocks and bonds, of an item of \$8,004.83, which might be described as a "carrying charge." Although the question there under discussion was not the point here involved, a reading of the judgment of the Court delivered by Anglin C.J.C. is helpful in considering the definition of "income". After referring to the statutory definition and discussing various English cases, he says:

"Of course, in construing English Income Tax decisions, one must always bear in mind that they depend largely upon the phraseology of the statutes under consideration; but I find it impossible to understand how, where the word 'income' is defined, as it is here, to be 'profit or gain', not from any particular transaction, but from the whole business of an entire year carried on by the 'person' upon whom the tax, in respect to it, is to be imposed, such 'income' can be arrived at otherwise than by taking account of the receipts for the year and deducting therefrom at least all expenditure made in, and properly attributable to, the earning of such receipts as a whole, including therein expenditure made in the hope of earning receipts for the business or undertaking, although such hope has been disappointed."

The definition of "income" in the Income War Tax Act, R.S.C. 1927, chapter 37, sec. 3, is somewhat different in form, but for the purposes of this case, to the same effect. In both Acts "income" is stated to mean . . . profit or gain . . . and shall include interest . . . from moneys at interest, and so forth, or from any other investment, and also profit or gain from any other source.

I have been unable to find any cases arising under the Income War Tax Act which would give support to the respondent's contention here, but on the other hand they seem to indicate that what is intended to be taxed is profit or gain which can only be ascertained by setting against the receipts the expenditures or obligations to which they have given rise.

In construing the section, if income means the profit or gain received by a corporation from its business or undertaking, then we may substitute for the word "income" its meaning, that is "profit or gain directly or indirectly received by a corporation from its business or undertaking", and the section goes on to provide that this shall include interest such as is here in question.

Furthermore, I think the moneys on deposit with the Trust Company were, under the circumstances here, employed in the business of the Company. Before setting out on the Company's programme of development, it was necessary to raise funds which was done by the sale of shares. It was prudent and proper to have the receipts deposited with the Trust Company pending expenditure. There is no suggestion that the deposit was of a permanent nature or that the Company thereby intended to divert this money from the development of its mining properties, but on the other hand it is said the money was raised to obtain finances for the completion of its development work, and under the circumstances I think that the moneys were, considering the position of the Company, part of the business and undertaking of the Company, and that in determining the Company's taxable income, if any, there should be set off against the interest received from such moneys, the expenses properly allowable for operating the Company during the tax period in question.

In this case, without discussing the items claimed in detail, it would seem, after allowing the statutory deduction and proper expense of operation, that the Company would have no taxable income.

For the reasons given I would so advise the learned County Court Judge.

The appellant Company should have its costs from the City Corporation.

MACTAGUE J.A., agreed with GILLANDERS J.A.

RIDDELL J.A. (dissenting):—This is an application by way of stated case by His Honour Judge Parker on questions of law, relating to the assessment by the City of Toronto—the matter being submitted under the authority of sec. 85 of the Assessment Act, R.S.O. 1937, ch. 272.

The facts are fully stated in the stated case and I need not here repeat them.

The decision of the matters must depend on the meaning to be attached to the language of the Statute, and especially secs. 1(f) and 9.

The former reads:

“ ‘Income’ shall mean the profit or gain directly or indirectly received by a corporation from its business or undertaking and shall include interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and also profit or gain from any other source.”

Sec. 9(a) reads:

“Subject to the exemptions provided for in sections 4 and 8.

“(a) every corporation not liable to business assessment under section 8 shall be assessed in respect of income.

Admittedly this corporation comes under this subsection; and the whole question is whether the interest received by it is “Income” within the meaning of the Act.

As to that I have no doubt from the definition of “Income” in sec. 1(f). The subject of the verb “shall include” is clearly the noun “Income,” which noun is here clearly made to *include* in its meaning such interest as is here in question—it has no reference to anything else in or out of the business.

If it were necessary, this conclusion would be strengthened by the provision at the end of the subsection “gain from any other source.”

I would so advise the learned Judge—the City should have the costs.

Appeal allowed with costs, RIDDELL J.A., dissenting.

[COURT OF APPEAL.]

The Brown Brothers Ltd. v. Popham et al.

Promissory notes—Liability of endorser—Note payable on demand at a particular place—Note not presented for payment to maker before action brought against endorser—Corporate existence of maker of note terminated by surrender of charter—Necessity of presentment for payment—The Bills of Exchange Act, R.S.C. 1927, ch. 16, secs. 92(a), 181 and 184.

By sec. 184(2) of The Bills of Exchange Act, R.S.C. 1927, ch. 16, where a promissory note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an endorser liable. In such a situation presentment is not dispensed with by the absence of the maker or of someone to represent him. Even the death of the maker does not dispense with presentment when the note is payable at a specified place: *Philpot v. Bryant* (1827), 3 C. & P. 244. Hence, where the maker is a limited company, presentment of a note made by it and payable at a particular place is not dispensed with on the ground that the corporate existence of the maker has been terminated by a surrender of its charter; in such a situation the holder of the note, if he desires to render an endorser liable, must present the note for payment at the particular place of payment stated in the note.

AN appeal by the defendants from the judgment of Rose C.J. H.C. reported in [1939] O.R. 544 whereby judgment was entered for the plaintiff on certain promissory notes.

November 7th and 8th, 1939. The appeal was heard by ROBERTSON C.J.O., FISHER and HENDERSON JJ.A.

W. N. Tilley, K.C., and John F. Boland, K.C., for the appellants, who were sued as endorsers of certain notes, contended that presentment for payment is the essence of the cause of action and that no such presentment was made. Nor have the plaintiffs proved that they were unable to effect presentment although they used due diligence and thus have presentment dispensed with under sec. 92(a) of The Bills of Exchange Act, R.S.C. 1927, ch. 16.

Counsel submitted that the learned Chief Justice of the High Court was in error in holding that the notes were a collateral and continuing security for the obligation of Greetings Ltd. to repay the advances and were within the proviso to sec. 181 postponing the time for presentment. The notes are the main security and are not therefore collateral to anything. The contract of the defendants with regard to the notes which they endorsed was one of suretyship. Reference to *Duncan Fox & Co. v. North and South Wales Bank* (1880), 6 App. Cas. 1; *MacDonald v. Whitfield* (1883), 8 App. Cas. 733, at p. 745; Halsbury, 2nd ed., vol. 2, sec. 935; *Re Boys* (1870), L.R. 10 Eq. 467; *In re Waddell*, 67 Con-

necicut Rep. 324; *International Trust Co. v. Union Cattle Company et al.* (1892), 3 Wyoming 803; *Early v. Early*, *Williams v. Early* (1878), 16 Ch. D. 214; Dictionary definition of "collateral"; *Pritchard v. Couch* (1913), 57 Sol. Journal 342; *Siddal v. Gibson et al.*, 17 U.C.Q.B. 98; *Bank of Montreal v. Strachan*, 65 O.L.R. 41; *Re George, Francis v. Bruce* (1890), 44 Ch. D. 627.

In no event could the notes in question be held as collateral and continuing security after the charter of Greetings Ltd. was surrendered under the circumstances in which it was surrendered.

The learned Chief Justice held that non-presentment was no defence by erroneously reading together sec. 92(a) and sec. 181 of the Act. These two sections cannot be made to co-operate so as to avoid the necessity of presentment for payment and thus render the defendants liable on the notes. The proviso to sec. 181 postpones presentment for payment under certain circumstances but presentment is not forbidden by the proviso, and the plaintiffs, who were conversant with all the facts leading up to the surrender of the charter of Greetings Ltd., cannot invoke excuse for delay under sec. 181 up to the date of the surrender and dispensation from presentment under sec. 92(a) afterwards.

As to the other branch of this appeal the appellants submit that they are not liable to pay the premium on the insurance policy. They did not contract to pay the premiums indefinitely. They agreed, under para. 4, to pay the premiums "so long as any portion of the moneys advanced hereunder by the company of the third part remains outstanding and unpaid". This must mean remains outstanding and unpaid by the company or by the defendants if they are liable to pay. After Greetings Ltd. surrendered its charter, the debt was no longer "outstanding" because there was no debtor. In the circumstances disclosed in evidence, the defendants were under no obligation to pay premiums that accrued after the liability of Greetings Ltd. was discharged.

R. L. Kellock, K.C., and *J. D. Arnup*, for the plaintiff, respondent, supported the finding of the learned trial Judge that these notes were given as a collateral or continuing security such as is contemplated by the proviso to sec. 181. If this is so, then lack of presentment for payment is no defence. In any event the learned trial Judge was wrong in holding that there was no presentment actually made. The defendants, besides being en-

dorsers of the notes, were the proper officers of the company to whom presentment should be made so that a simple demand for payment addressed to them personally operates as a presentment to the company for payment.

These notes were made payable at a specified place, *i.e.*, the respondents' office and as the notes were held there, no further presentment was necessary.

Counsel further submitted that the learned trial Judge was wrong in finding that the endorsers had not promised to pay the notes and thus waived presentment and notice of dishonour. Reference to *Sparks v. Hamilton*, 47 O.L.R. 55, at p. 88; *Britton v. Milsom*, 19 A.R. 96; *Bessenger v. Wenzel* (1910), 161 Michigan 61; *J. W. O'Bannon Company v. James M. Curran* (1908), 129 Appellate Division Reports N.Y. 90.

As to the question of the premiums, counsel supported the findings of the trial Judge that the defendants must pay these premiums. The agreement was to pay the premiums "so long as any portion of the moneys advanced hereunder by the company of the third part remains outstanding and unpaid". Outstanding and unpaid are synonymous. Unquestionably the debt was unpaid and the obligation to pay endured until the plaintiffs received back the money they had advanced.

Cur. adv. vult.

November 30th, 1939. ROBERTSON C.J.O.:—An appeal from the judgment of the Chief Justice of the High Court of June 16th, 1939, after the trial of the action before him, without a jury, at Toronto.

The action was brought by the respondent, the payee named in certain promissory notes made by Greetings Limited, payable on demand. The appellants are sued as endorsers.

Appellants, late in 1931, procured the incorporation of "Greetings Limited", and on January 2nd, 1932, an agreement was entered into between Greetings Limited of the first part, appellants of the second part, and respondent of the third part. The agreement provided for advances to be made by respondent to provide working capital for the new company. The method adopted was that on each occasion when Greetings Limited required an advance, respondent made its promissory note payable on demand to Greetings Limited for the amount required, and the note was then discounted at the Bank of Toronto under

arrangement made with the bank by respondent, Greetings Limited receiving the proceeds. Concurrently with each of these transactions, Greetings Limited gave respondent its own promissory note, payable on demand, for the same amount as respondent's note discounted at the bank. Appellants, who were respectively president and general manager of Greetings Limited, personally endorsed the notes of Greetings Limited. They were not endorsers in the strict sense, not having been otherwise parties to the notes, but having signed, they became, by sec. 131 of The Bills of Exchange Act, subject to all the provisions of the Act respecting endorsers: see *Gallagher v. Murphy*, [1929] S.C.R. 288.

Under the agreement respondent gave Greetings Limited its demand promissory notes, fourteen in all and in an aggregate amount of \$40,000.00. The last of the notes is dated 13th October, 1932. Concurrently with each of these, respondent received from Greetings Limited the latter's demand promissory note, endorsed by appellants, in like amounts. All the notes of Greetings Limited were made payable at respondent's office, with the exception of one note for \$15,000.00, dated May 20th, 1932, which was made payable at the Bank of Toronto.

Late in 1932 respondent informed Greetings Limited that respondent was not prepared to make any further advances, but did not then request repayment of advances already made, although the agreement expressly reserved to respondent the right to demand payment at any time of any of the notes of Greetings Limited made in respondent's favour. Appellants thereupon looked for assistance for their company elsewhere, and finally reported to respondent that it might be possible to arrange with Rolph-Clark-Stone Limited to take over the business. Respondent took up and carried on the negotiations with Rolph-Clark-Stone Limited which resulted in an agreement, dated June 29th, 1933, between Greetings Limited and Rolph-Clark-Stone Limited for the sale to the latter of the business of Greetings Limited. Notwithstanding the fact that Greetings Limited had in the meantime reduced the amount owing for advances at the bank to \$25,000.00, the price to be paid on the sale to Rolph-Clark-Stone Limited would still leave a substantial amount owing, and appellants objected to a sale on these terms. They had evidently expected that Rolph-Clark-Stone Limited would assume the obligations of the business on taking it over. Appel-

lants were, however, in no position to dictate, for respondent had required appellants to transfer the majority of the issued shares of Greetings Limited into the name of respondent's nominee, and respondent was, therefore, in control of the situation, and insisted that the sale should go through.

Mr. E. G. Clarkson was made trustee under The Bulk Sales Act to receive and distribute the purchase price. He made the distribution in two dividends, the last being paid on 4th December, 1933, and the Bank of Toronto in this manner received enough to reduce its claim of \$25,000.00 to \$13,283.61 and accrued interest of \$637.19. As the assets of Greetings Limited were now exhausted, respondent took up this balance of the bank's claim, paying the accrued interest by cheque and giving the bank respondent's own note, which it subsequently paid, for \$13,283.61. Respondent's judgment now in appeal, so far as the notes are concerned, is against appellants as endorsers for the recovery of these two sums aggregating \$13,920.80, with interest from the commencement of the action.

The questions raised at the trial and again on this appeal are questions of presentment for payment of the notes of Greetings Limited, endorsed by appellants, waiver of presentment and notice of dishonour, and the dispensing with presentment for payment by The Bills of Exchange Act.

At least some of these questions could be dealt with more simply if the statement of claim had contained the allegations that are usually considered essential to the proper statement of a cause of action against the endorsers of a promissory note. There is no statement that the notes were presented for payment at any time, or that presentment was waived or dispensed with. Nor does the statement of claim say which notes of the fourteen notes aggregating \$40,000.00 of principal, are sued upon. The learned Chief Justice, after careful consideration of the several alternative propositions presented to him, held that there had been no presentment for payment of any of the notes and that presentment had not been waived by appellants. He gave effect, however, to respondent's contention that sec. 92(1) (a) of The Bills of Exchange Act applied and that presentment was dispensed with. Each of these disputed questions was again presented on this appeal, perhaps more broadly than at the trial.

As already stated, all the notes of Greetings Limited, endorsed by appellants, were made payable at respondent's office with

the exception of one note for \$15,000.00, which was payable at the Bank of Toronto. These notes were all held at respondent's office from the time of delivery, except that for a time, not well defined but probably about April or May, 1934, they were at the office of respondent's solicitors who were drawing an agreement to put before appellants. It is not suggested that the notes, or any of them, were ever produced and exhibited to anyone with a demand for payment, but it is said that appellants were the officers of Greetings Limited to whom presentment should be made, and that when appellants were in respondent's office where the notes were held, demands for payment were made, and that this was sufficient presentment. The occasion or occasions when it is claimed that a demand for payment was so made were not fixed by the evidence with any close accuracy as to date, but respondent's general manager, Mr. Chipman, who made any demand that was made, fixed a period in 1933 before the agreement of sale to Rolph-Clark-Stone Limited was signed, but after the negotiations for the sale had proceeded to a point where it was evident that there would be an unpaid balance of the advances after the proceeds of the sale had been distributed among the creditors of Greetings Limited. Mr. Chipman says that on the first occasion when he brought it to appellants' attention that there would remain a balance owing, he told appellants that they would have to pay that balance. On a somewhat later occasion, but still within the period mentioned, he says he informed appellants that respondents would accept \$10,000.00 and wipe out everything above that, and that he demanded payment of \$10,000.00 from appellants. The learned Chief Justice, after reviewing the evidence, pointed out that it is impossible upon this evidence to find any presentment of the notes to Greetings Limited, or any demand upon that company for payment. Such demand as there was for payment was addressed to appellants personally as endorsers of the notes, and not to them as the representatives of Greetings Limited. Relevant to this it is significant that what was said on the occasions when these demands were made is relied upon by respondent to support its alternative claim that appellants, as endorsers, waived presentment by personally promising to pay.

I understood counsel for respondent to submit the further proposition that the notes, being payable at a specified place, that is at respondent's office, and the notes being held there,

nothing further was necessary by way of presentment, as decided in *Bailey v. Porter* (1845), 14 M. & W. 44; *Harris v. Perry* (1859), 8 U.C.C.P. 407, at p. 409, and other similar cases. These decisions are easily applied where a note is payable at a date fixed by the note itself. I do not see how they can be applied, however, to a note payable on demand. If the mere holding of the note at the place specified for payment is a good presentment, without more, the consequence would be that each of the notes in question here would have become due on the day respondent first had it in its office, and if not on that day I do not know what there is to distinguish any one of the many days when the notes were held there, as the day on which they are to be deemed to have been presented.

There is, in my opinion, grave doubt whether it is a good demand for payment where there are a number of notes of varying amounts, some of which have been paid and some are unpaid, and one of which is not payable at the place where demand is made, to demand payment of a lump sum in respect of all the notes without distinction, even if the sum demanded is the amount remaining unpaid on such of the notes as have not already been paid in full. Each of the fourteen notes endorsed by appellants was pledged with respondent in respect of one particular advance. They were not given to secure a general balance of account. When a note held by the Bank of Toronto for an advance was paid, the corresponding note pledged with respondent was discharged. There is the further difficulty here that the sum that appellants were told they must pay was not the amount then remaining unpaid, but a balance that would remain unsatisfied after receipt of the dividends under The Bulk Sales Act. Besides all of this there is the circumstance that the note that was not payable at the place of demand was for \$15,000.00, three-fifths of the whole amount outstanding. In my opinion that note was wholly unpaid in June, 1933, a fact that is not, I think, in the least affected by respondent's assumed appropriation of payments at the trial.

The next question for determination is whether presentment for payment and notice of dishonour were dispensed with by appellants. Respondent says that appellants promised to pay and upon that promise bases its contention in this regard. The learned Chief Justice has found as a fact, however, that no such promise was made, and I am of the opinion that his finding is

right, and it cannot be disturbed. One would be more inclined to give weight to respondent's contention in this regard if appellants had not consistently objected to the course taken by respondent to close up the affairs of Greetings Limited. If appellants had themselves negotiated the sale to Rolph-Clark-Stone Limited and had themselves brought about the situation that gave rise later to the demand upon them, and if they had for purposes of their own put an end to the existence of Greetings Limited, the principal debtor, one would perhaps not require very much to find that to secure respondent's assent to these things they had waived presentment for payment to Greetings Limited, as a condition of their own liability. The real situation was, however, a very different one. Appellants say that when they informed respondent that Rolph-Clark-Stone Limited would likely be interested in taking over the business, they themselves expected that liabilities as well as assets would be taken over. Respondent then negotiated the sale to Rolph-Clark-Stone Limited and appellants objected to the terms of sale as soon as they were informed of them. They were helpless, however. Respondent had control of the majority of the issued shares of Greetings Limited, and, notwithstanding appellants' objection, they did not hesitate to put the sale through. There is nothing before us to warrant any criticism of respondent for so doing, and it must be taken that they acted wisely and were quite within their rights. Appellants, however, were not satisfied, and although as officers of Greetings Limited, they carried out respondent's directions, they could do nothing else. For months after the agreement of sale was signed they avoided discussion of the payment of the balance of the advances in spite of respondent's efforts to arrange a meeting. When a meeting was at length brought about in April or May of 1934 appellants' position, definitely taken, was that they were surprised that they were asked to pay anything, and they could not be brought to make any arrangement for payment. In view of this position, consistently taken by appellants throughout, it is hard to believe that they intentionally waived any condition essential to liability on their part.

The learned Chief Justice has held, however, that in the end presentment became unnecessary because after the exercise of reasonable diligence it could not be effected, and he has applied sec. 92(1) (a) of The Bills of Exchange Act. It should be stated that after Mr. Clarkson, acting as trustee under The Bulk Sales

Act, had distributed the proceeds of the sale of the assets of Greetings Limited, steps were taken to surrender the charter of that company. The agreement of sale to Rolph-Clark-Stone Limited provided that after completion of the sale the vendor, Greetings Limited, should forthwith either surrender its charter or change its name to a new name to be satisfactory to the purchaser. Pursuant to this Greetings Limited applied, in March, 1934, to surrender its charter, and a certificate, dated 3rd April, 1934, was issued from the Department of the Secretary of State of Canada certifying the acceptance of the surrender, and that the 3rd April, 1934, had been fixed as the date upon and from which Greetings Limited should be dissolved.

The learned Chief Justice, having already found that there had never been a presentment of the notes for payment, proceeded to find that up to the time of the commencement of the action the appellants, as endorser, had not been discharged by delay in presentment, relying upon sec. 181 of The Bills of Exchange Act, which is as follows:

"181. If a promissory note payable on demand, which has been endorsed, is not presented for payment within a reasonable time the endorser is discharged: Provided that if it has, with the assent of the endorser, been delivered as a collateral or continuing security it need not be presented for payment so long as it is held as such security."

The learned Chief Justice held that the notes in question were a collateral or continuing security for the obligation of Greetings Limited to respondent to repay the advances, and were within the proviso of this section. I am inclined to agree that the notes in question had, with appellants' assent, been delivered as a collateral but not as a continuing security within the meaning of sec. 181, but I do not think the determination of that matter is necessary to the decision of this appeal. All that is accomplished by sec. 181, when it applies, is to extend the time for presentment, and no matter how long that time may be extended, presentment must, in the end, be made before the endorser can be sued, unless presentment is waived by the endorser or is dispensed with by the statute, for an endorser's engagement is only that on due presentment the note will be paid.

With great respect for the opinion of the learned Chief Justice of the High Court I am unable to agree with his conclusion that presentment was dispensed with. Presentment of all the

notes but one, was, according to their terms, to be made at respondent's office. The \$15,000.00 note called for presentment at the Bank of Toronto. No doubt can be raised that these places continue to exist, and presentment could have been made there at any time. Section 184 of The Bills of Exchange Act is as follows:

"184. Presentment for payment is necessary in order to render the endorser of a note liable.

2. Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an endorser liable."

It is, of course, not suggested by anyone that the holder of a note must contrive by some means to procure the presence of the maker at the place of payment on the due date, to make a proper presentment. Presentment at the proper place is not dispensed with by absence of the maker or of someone to represent him.

Section 89 which, by sec. 186, is made to apply, with necessary modifications, to promissory notes, is as follows:

"89. Where a bill is presented at the proper place as afore-said and after the exercise of reasonable diligence, no person authorized to pay or refuse payment can there be found no further presentment to the drawee or acceptor is required."

Presentment at the proper place is not dispensed with, so far as an endorser is concerned, by a statement of the maker that he does not intend to pay, or by his insolvency or becoming bankrupt so that he cannot pay: *Sands v. Clarke* (1849), 8 C.B. 751. Even the death of the maker does not dispense with presentment when the note is payable at a specified place: *Philpot v. Bryant* (1827), 3 C. & P. 244. Presentment at the specified place was a condition of the endorser's liability, and presentment at respondent's office was not impossible. The fact that owing to insolvency of the maker or the maker having ceased to exist nothing could have been got from the maker by such presentment, does not dispense with presentment. In my opinion presentment for payment was not dispensed with by sec. 92(1) (a) of The Bills of Exchange Act, and, as presentment is essential to appellants' liability, respondent is not entitled to judgment against appellants upon the notes in question.

There is another claim involved in the appeal. The agreement of 2nd January, 1932, providing for advances to Greetings

Limited, stipulated that each of the appellants should deliver to respondent a policy of insurance on his life to the amount of \$10,000.00, with an assignment thereof to respondent, and it was agreed that Greetings Limited and appellants should "keep the said policies in force and make payment of the premiums thereon so long as any portion of the moneys advanced hereunder by the company of the third part (respondent) remains outstanding and unpaid." Provision was made for crediting any moneys realized under either of the policies on the indebtedness, and for re-assignment of the policies to appellants or their nominees upon repayment of all the indebtedness. Insurance policies were assigned as agreed, and appellants paid the premiums for a time but ceased paying after part of the premiums due on 7th February, 1933, had been paid. Respondent paid the balance unpaid in respect of the 1933 premiums, and all the premiums since, and claims to recover \$1,615.06, the amount so paid down to the date of the writ in 1936. The learned Chief Justice having found a large sum to be still "outstanding and unpaid" in respect of the advances, there was, on the basis of that finding, no defence to this claim, and respondent was held to be entitled to recover the amount so paid by it for premiums. A good deal more has been paid since the commencement of this action, but it is not recoverable here, nor is it sued for.

I think there can be no question of respondent's right to recover whatever it paid in respect of premiums while Greetings Limited continued in existence. It is beyond question that so long as it continued to exist Greetings Limited was indebted for the unpaid balance of the advances, and that portion of the advances was, in every sense of the words "outstanding and unpaid". The position after the surrender of the charter of Greetings Limited is not so clear. The covenant to pay the premiums was the covenant of appellants as well as the covenant of Greetings Limited. They were not in the relationship of surety and principal in this matter, and even if the surrender of the charter of Greetings Limited were proved to be the act of respondent, appellants would not be released from liability as a surety would be on the discharge of the principal. To determine the question I think one must first arrive at the proper meaning of the covenant to pay the premiums. For respondent it was argued that it is clear beyond dispute that the advances were never wholly repaid, and that it follows that some portion of the moneys

advanced remains outstanding and unpaid. For appellants it is submitted that "outstanding and unpaid" means something more than merely "unpaid"—that the word "outstanding" carries an implication of the continued existence of the liability, and that one cannot properly speak of a sum as "outstanding" if there is no one in existence who is under legal obligation to bring it in. I think it is sound construction to endeavour to give to every word of a covenant a meaning so that no word shall be superfluous: *Reg. v. Bishop of Oxford* (1879), 4 Q.B.D. 245, at p. 261. Applying that rule here—and I think it should be applied, and that "outstanding" should be given the meaning contended for by appellants—it becomes necessary to find that someone continued to be liable in respect of the advances, not only after the surrender of the charter of Greetings Limited, but until something more was paid by respondent in respect of the premiums, if appellants are to be held liable to reimburse respondent for the amount so paid. In the final analysis, I think that means that one must determine whether appellants continued to be liable on the demand notes they had endorsed.

It may be that appellants, as endorsers, being only sureties for Greetings Limited, were discharged by the surrender of the charter of Greetings Limited, but I do not care to determine the matter upon that ground, for all the necessary facts may not be before us. It seems to me to be plain, however, that whatever may have been respondent's duty as to presentment for payment before Greetings Limited ceased to exist, it could not continue indefinitely to hold appellants as endorsers when Greetings Limited no longer existed. Appellants' liability, if any, could not with propriety then be termed "collateral". It was the only liability that remained, if any remained. I think it then became the duty of respondent to make prompt presentment for payment, and that having failed to do so, appellants were discharged as endorsers.

In my opinion, therefore, it is impossible to find that when the next premiums came due in February, 1935, there was any portion of the advances "outstanding and unpaid", and that respondent is entitled to recover only the amount paid by it while Greetings Limited continued to exist.

The appeal will, therefore, be allowed and the judgment will be varied by reducing the amount of respondent's recovery to \$647.36, being the amount paid in respect of insurance premiums

in the years 1933 and 1934. The appellants should have the costs of the appeal, and there should be no costs of the action to either party prior thereto.

FISHER J.A. agreed with ROBERTSON C.J.O.

HENDERSON J.A.:—I have had the privilege of reading the opinion of my Lord, the Chief Justice, and I concur in the conclusions which he has reached.

Having regard to the precise terms of the agreement of the 2nd day of January, 1932, in which the parties defined their rights and obligations, I am inclined to the view that the promissory notes sued on were not taken as collateral, but that they were primary securities in the hands of respondent. I am unable to define to what they would be collateral, having regard to the form of the agreement, and the way in which the parties carried on their transactions. One would have expected to find in the contract a covenant by Greetings Limited for the repayment of the advances. The parties, however, expressly adopted another method and instead of such a covenant we find these promissory notes payable on demand in favour of the plaintiff, and carrying the endorsement of the defendants.

It becomes unnecessary to determine this point as I agree in any event that presentment and demand for payment and notice of dishonour were necessary.

Appeal allowed and plaintiff's judgment reduced to \$647.36; costs of the appeal to the defendants, no costs of the action prior thereto to either party.

[COURT OF APPEAL.]

**Commercial Credit Corporation of Canada Ltd. v. Niagara
Finance Corporation Ltd.**

Conditional sales—Conditional sale of automobile—Agreement not filed—Subsequent sale of automobile by Division Court bailiff under execution against conditional purchaser—Action by conditional vendor against purchaser at bailiff's sale for conversion—Whether purchaser at bailiff's sale protected—The Conditional Sales Act, R.S.O. 1937, ch. 182, sec. 2—The Execution Act, R.S.O. 1937, ch. 125, sec. 18.

By sec. 2 of The Conditional Sales Act, R.S.O. 1937, ch. 182, a reservation of title by a conditional seller of chattels is, unless the contract is filed as provided by the Act, invalid "as against a subsequent purchaser or mortgagee claiming from or under the purchaser . . . without notice in good faith and for valuable consideration."

Held, by the majority of the Court, that a purchaser of a chattel at a sale held by a Division Court bailiff pursuant to an execution against the conditional purchaser of the chattel claims "from or under" the conditional purchaser and is entitled to invoke the protection afforded by sec. 2 of the Act as against the conditional seller. The purchaser obtains at the sale only what the debtor could give him; the purchaser claims under the debtor's title, such as it is, and therefore under the debtor who is the conditional purchaser.

Per Robertson C.J.O. (dissenting): By sec. 2 of the Act the only persons who are protected are purchasers and mortgagees of the goods themselves who claim from or under the conditional purchaser. A bailiff who sells goods, the title to which is in the conditional vendor, under an execution against the goods of the conditional purchaser commits a wrongful act, and a purchaser at the bailiff's sale acquires no title to the goods as against the conditional vendor. To hold otherwise is in effect to add the creditors of the conditional purchaser to the persons whom the Act protects.

AN appeal by the plaintiff from a judgment of His Honour Judge Livingstone, of the County Court of the County of Welland, dismissing the action.

September 20th, 1939. The appeal was heard by ROBERTSON C.J.O., MASTEN and McTAGUE JJ.A.

H. F. Parkinson, K.C., for the plaintiff, appellant, submitted that, apart from the alleged effect of The Conditional Sales Act, R.S.O. 1937, ch. 182, the interest of the purchaser of a motor car under a conditional sale agreement before payment in full is merely equitable and, as the bailiff can sell no greater title than a judgment debtor possesses, the respondent would not have obtained title at the sale. The respondent must establish its title to defend successfully this action and, consequently, must bring itself within sec. 2(1) of The Conditional Sales Act which will entitle it to be treated as the owner of the motor car.

Section 2(1) of the Act provides that, where the conditional sale agreement is not registered, then as against a subsequent purchaser or mortgagee claiming from or under the purchaser, without notice, in good faith and for valuable consideration, the purchaser shall be deemed the owner of the goods.

It is admitted that the conditional sale agreement was not registered, but the appellant maintains that a judgment creditor who purchases at a sale by the bailiff under execution the property of the judgment debtor is not a subsequent purchaser within the meaning of sec. 2(1).

The Conditional Sales Act by clear inference does not intend a creditor of the conditional purchaser to receive the protection of sec. 2(1) since creditors are specifically mentioned in subsec. (3) and omitted in subsec. (1). See Craies on Statute Law, 4th ed. 96; 31 Halsbury, 2nd ed. 483; 10 C.E.D. 234; *Glenn v. Schofield*, [1928] S.C.R. 208.

This view is strengthened by reference to sec. 7 of The Bills of Sale and Chattel Mortgage Act, R.S.O. 1937, ch. 181, which Statute is *in pari materia* with The Conditional Sales Act. That section specifically protects creditors of the mortgagor from unregistered chattel mortgages. It is fair to assume that if the legislature had intended to protect creditors of the conditional purchaser from unregistered conditional sale agreements it would have specifically mentioned them in subsec. (1) of sec. 2.

The bailiff's power to sell under execution is derived from the Statutes, and hence a purchaser at such a sale should not be considered as a purchaser from or under the conditional purchaser according to a strict interpretation. Section 2 of The Conditional Sales Act limits the common law rights of a conditional vendor and hence should be strictly construed: See Craies on Statute Law, 4th ed. 111; *Bank of Montreal v. Ideal Knitting Mills Ltd.* (1924), 55 O.L.R. 410; *Re Ingersoll*, *Gray v. Ingersoll* (1888), 16 O.R. 194.

A. L. Brooks, K.C., for the defendant, respondent, submitted that sec. 2 of The Conditional Sales Act, R.S.O. 1937, ch. 182, modifies the well settled rule that a bailiff can only sell under execution the interest of the judgment debtor and no more.

Section 2(1) provides that where possession of goods is delivered to a purchaser and there is a provision that the ownership is to remain in the seller until payment in full, as against a purchaser claiming from or under the conditional purchaser

without notice in good faith and for valuable consideration, such provision shall be invalid and such purchaser shall be deemed the owner of the goods, unless the contract is duly registered.

There is no doubt that the contract was not registered and also that the respondent was a purchaser without notice in good faith and for valuable consideration. The sole question is whether a purchaser at a bailiff's sale is a purchaser claiming "from or under" the conditional purchaser.

The words "from or under" are very broad. The whole trend of decisions in the United States is to include purchasers at bailiffs' sales within the protection of the corresponding conditional sales Acts: Williston on Sales, 2nd ed. p. 759, para. 327; 55 Corpus Juris, p. 1250; Jones on Chattel Mortgages and Conditional Sales, Bowers Edition 1933, volume 3, p. 177, para. 1102; Griffin and Curtiss on Chattel Mortgages and Conditional Sales, p. 229; *F. A. Ames & Co. v. Slocomb Mercantile Company* (1910), 166 Ala. 99, at p. 103; *Pugh v. Highley* (1898), 152 Ind. R. 252; *French v. DeBow* (1878), 38 Mich. 708; Halsbury, 2nd ed., p. 62; *Richards v. Johnston* (1859), 4 H. & N. 660.

If the respondent had bought directly from the judgment debtor there could be no doubt that it would be protected. There seems to be no good reason why the intervention of a bailiff should alter this situation.

Counsel also argued that, as the respondent took the precaution to search in the proper office for a conditional sale agreement and found none, it is entitled to be protected from unregistered secret claims. The appellant in order to save trouble and expense omitted to register the agreement here in question and, consequently, it is only equitable that it should bear the loss.

Sales under execution are obviously in the interest of the public and it would defeat their purpose if a *bona fide* purchaser were liable to be prejudiced in his purchase by concealed claims.

Cur. adv. vult.

October 31st, 1939. MASTEN J.A.:—In this case I have had the advantage of perusing and considering the reasons of judgment of my Lord the Chief Justice and of my brother McTague. It is needless to say that, as they disagree, I have given to them both the best considerations of which I am capable.

In this judgment I have referred to the appellant as the original vendor, to Teakle as the original vendee and to the respondent as the sub-purchaser.

I find the question involved in the present appeal not only important but nice and difficult, and I express my reasons with some diffidence. Nevertheless, having arrived at a definite conclusion, it is my duty to state as best I can my reasons therefor.

As was determined in the case of *Whitely v. Hilt*, [1918] 2 K.B. 808, the general rule of the common law does not apply with full effect in the case of a conditional sale agreement which is not simply a contract of bailment, but contains an option to purchase; which introduces the element of sale with the result that it confers on the vendee an *interest of a proprietary kind* and makes the interest of the vendee under the conditional sale agreement assignable by him so that it can be enforced by the assignee.

But in the present case, by clause 6 of Teakle's agreement of purchase (Exhibit 1) he agrees that he will not part with the possession or control of the motor vehicle in question, and that he will keep it clear of all liens and encumbrances. The effect of these clauses is that Teakle was a bailee without the right to assign the chattel, or part with his possession of it. A breach by him of the terms of his agreement is a contravention of the terms of his bailment, and renders any third party, however innocent, who deals with the chattel guilty of conversion, unless protected by the provisions of the Conditional Sales Act.

The question for our determination is therefore whether in the circumstances of this case the Conditional Sales Act upon its true interpretation and construction applies so as to render invalid as against the respondent the appellant's claim.

The facts and circumstances have been so fully stated in the judgment of my Lord, the Chief Justice, and my brother McTague, that I refrain from rehearsing them, except to point out that the respondent in the present appeal, before attending the bailiff's sale, searched in the proper registry office to ascertain whether the motor vehicle in question was subject to a registered conditional sale, and found that no such conditional sale agreement was registered; also, as found by the trial Judge, the respondent had no notice of any such conditional sale agreement prior to the time when the property was sold and delivered to him, and his purchase price, \$135.00, was paid. It had no

knowledge of the secret claim of the appellant and thought it was buying the motor vehicle free and clear of any charge, and that the bailiff was in a position to give it a good title under the executions in his hands.

As already pointed out, however, this innocence will not protect it against a claim for conversion unless it is entitled to the benefit of sec. 2 of the Conditional Sales Act, R.S.O. 1937, ch. 182, which reads as follows:

"2.—(1) Where possession of goods is delivered to a purchaser, or a proposed purchaser or a hirer of them, in pursuance of a contract which provides that the ownership is to remain in the seller or lender for hire until payment of the purchase or consideration money or part of it, as against a subsequent purchaser or mortgagee claiming from or under the purchaser, proposed purchaser or hirer, without notice in good faith and for valuable consideration, such provision shall be invalid, and such purchaser, or proposed purchaser or hirer, shall be deemed the owner of the goods, unless

(a) the contract is evidenced by a writing signed by the purchaser, proposed purchaser or hirer or his agent, stating the terms and conditions of the sale or hiring and describing the goods sold or lent for hire; and,

(b) within ten days after the execution of the contract a true copy of it is filed in the office of the clerk of the county or district court of the county or district in which the purchaser, proposed purchaser or hirer resided at the time of the sale or hiring."

I think that the Act does apply and supports the respondent's defence. The words of the Act make the ownership which remains in the original vendor invalid generally as against a subsequent purchaser without notice in good faith and for valuable consideration if he claims "from or under" the original purchaser.

I think that the respondent claims "under" Teakle. Its title, however colourable it might be apart from the statute, comes through Teakle, and I think that "under" means "through". In my opinion the intention of the legislation is to protect every *bona fide* sub-purchaser claiming under the original vendee as against an unregistered sales agreement.

This is made plain because the statute admittedly renders invalid the unregistered conditional sales agreement where the original purchaser fraudulently assumes to sell to the sub-

purchaser the whole property and possession in the goods. The test is not the validity of his conveyance but the *bona fides* of the sub-purchaser. I think that this Court is not at liberty to read into subsec. 1 of sec. 2 of the Act additional words so as to confine the benefit of the section exclusively to subsequent purchasers, to whom a voluntary sale is made by the original vendee.

Nor can we by implication import into the statute supplementary prerequisites to its application beyond those which are expressly stated and which I have just enumerated.

In further support of this view I point out that as regards the right to sell to a sub-purchaser in such circumstances as here exist, the bailiff was in a stronger position than Teakle, for Teakle was precluded or estopped by the terms of Exhibit 1 from selling, and any attempt by him to do so would be fraudulent on his part.

But there is nothing to interfere with the power conferred on the bailiff by sec. 18 of the Execution Act, R.S.O. 1937, ch. 125, to sell the proprietary interest of Teakle in the motor vehicle. On seizure he had lawful possession coupled with a power to sell Teakle's interest. He did so. He received from the respondent the purchase price \$135.00, and he delivered to the respondent the motor vehicle in question.

Subsequently the appellant for the first time attempts to assert its claim under its unregistered conditional sales agreement, but in my opinion it is precluded from enforcing such claim because the statute declares it to be invalid as against the respondent a *bona fide* sub-purchaser.

For these reasons, I think that if the statute would apply to protect a sub-purchaser from the original vendee, much more does it apply to protect the respondent who honestly acquires the interest of Teakle through the bailiff.

But apart from my verbal examination of the words of sec. 2, I think that a consideration of the whole Act in the light of the general rules of statutory construction leads to the same conclusion as I have just stated. What was the mischief which the Legislature sought to remedy? Surely it was the harshness of the common law which rendered liable to an action of conversion every person who innocently intermeddled with property covered by a secret unregistered instrument.

The remedy which the Legislature devised for the purpose of obviating the mischief is to declare that the conditional sales

agreement unless registered shall be invalid as against the subsequent purchaser who buys from or under the original vendee *bona fide* and without notice. As it appears to me, the benefit of the statute was intended to pass to every *bona fide* purchaser and is not conditioned on the power or authority of the party who assumes to sell to the sub-purchaser.

But in another aspect, there is in my view no injustice in the conclusion at which I arrive. The appellant for its own advantage concluded not to register its contract and to take the chances that its claim might be defeated by force of the statute. It probably failed to envisage the circumstances of the present case or, if it did, then in my view it misinterpreted the statute. In any event it took its chances and it still has its claim against Teakle personally. As its omission to register has given rise to the present situation where some one must suffer, it is equitable that the one whose omission has originated the situation should bear the loss rather than that the respondent should lose the \$135.00 paid to the bailiff and also be condemned in damages as a wrongdoer.

I would for these reasons concur with my brother McTague and dismiss the appeal.

MCTAGUE J.A.:—Appeal by the plaintiff from a judgment of His Honour Judge Livingstone of the County Court of the County of Welland, dated 29th day of June, 1939, by which the action brought against the defendant in detinue for delivery up of an automobile, or in the alternative for damages for wrongful conversion, was dismissed.

On the 8th day of June, 1938, Mills Motor Sales sold a Ford sedan to one Robert Teakle under conditional sale contract bearing the same date. By indenture also dated the 8th day of June, 1938, Mills Motor Sales as vendor assigned all interest in the conditional sale contract to the plaintiff corporation. The contract was not registered pursuant to the Conditional Sales Act, R.S.O. 1937, ch. 182. Instalment payments were made by the purchaser Teakle pursuant to the contract until default was made in December, 1938. The unpaid balance owing as of the 28th of January, 1939, and due by virtue of the acceleration clause is admitted to be \$245.25. Some time prior to the 28th January, 1939, two judgments had been obtained in a Division Court, one of them by the defendant, against Teakle. The Divi-

sion Court bailiff had placed the car in seizure. After advertising the bailiff sold the car at auction for \$135.00 to the defendant company. Whether it is admitted or not, the weight of evidence establishes that the defendant had at no time prior to the bailiff's sale or at the time of the sale any notice whatever of the plaintiff's claim or the conditional sale contract. From the bailiff the defendant was clearly a purchaser without notice in good faith and for valuable consideration. The question is whether he can be said to be one who claims from or under Teakle, the conditional sale vendee, and thereby be entitled to the protection of the Conditional Sales Act.

Interpretation of sections of two statutes is involved, the Conditional Sales Act, R.S.O. 1937, ch. 182, part of sec. 2, and the Execution Act, R.S.O. 1937, ch. 125, sec. 18. The part of the section of the Conditional Sales Act reads as follows:

"2.—(1) Where possession of goods is delivered to a purchaser, or a proposed purchaser or a hirer of them, in pursuance of a contract which provides that the ownership is to remain in the seller or lender for hire until payment of the purchase or consideration money or part of it, as against a subsequent purchaser or mortgagee claiming from or under the purchaser, proposed purchaser or hirer, without notice in good faith and for valuable consideration, such provision shall be invalid, and such purchaser, or proposed purchaser or hirer, shall be deemed the owner of the goods, unless

(a) the contract is evidenced by a writing signed by the purchaser, proposed purchaser or hirer or his agent, stating the terms and conditions of the sale or hiring and describing the goods sold or lent for hire; and,

(b) within ten days after the execution of the contract a true copy of it is filed in the office of the clerk of the county or district court of the county or district in which the purchaser, proposed purchaser or hirer resided at the time of the sale or hiring."

Section 18 of the Execution Act reads as follows:

"18. The sheriff may seize and sell any equitable or other right, property, interest or equity of redemption in or in respect of any goods, chattels or personal property, including leasehold interests in any land of the execution debtor, and, except where the sale is under an execution against goods issued out of a division court, the sale shall convey whatever equitable or other

right, property, interest or equity of redemption he had or was entitled to in or in respect of the goods, chattels or personal property at the time of the delivery of the execution to the sheriff for execution, and where the sale is under an execution against goods issued out of a division court the sale shall convey whatever equitable or other right, property, interest or equity of redemption the debtor had or was entitled to in or in respect of the goods, chattels or personal property at the time of the seizure."

By sec. 2 of the Conditional Sales Act, the vendor who has failed to register his conditional sale contract is precluded from asserting his rights to chattels covered by the contract against a subsequent purchaser without notice in good faith and for valuable consideration claiming from or under the conditional sale vendee. It is not a matter of his title or ownership being in question. The statute simply precludes him from setting it up unless he complies with the registration requirements. Under sec. 18 of the Execution Act the bailiff could only sell any interest which the debtor had in the automobile. For that matter, the debtor himself could not sell any interest beyond what he had. It is not a question at all of conveying a higher title than the debtor possesses. The real fundamental proposition is that when a sale is made by the conditional sale vendee purporting to be a sale of the chattel itself, the conditional vendor who has failed to comply with the statute is by it precluded from asserting his rights against a certain type of purchaser. In the case of the seizure under execution the goods or whatever right the debtor has in them remain his right up to the time of the sale. The sheriff or bailiff, while having the right to sell given by the statute, is only the legal custodian having a right to maintain trespass or trover against third parties before the sale takes place but no more. The debtor can always up to the time of the sale pay off the debt and take possession without any formalities of any kind. All the purchaser obtains at the sale is what the debtor could give him. In other words he is a person claiming under the debtor's title such as it is, and, therefore, I think, under the debtor. But where the sale purports to be a sale of the chattel itself, sec. 2 of the Conditional Sales Act comes into operation and precludes the conditional vendor who has not registered from asserting rights which he might otherwise possess, just as if the sale had been made by the debtor himself.

In *Crane & Sons v. Ormerod*, [1903] 2 K.B. 37, it was held that where goods are taken in execution by a bailiff and no claim having been made for them or sale by the bailiff, and it subsequently appears that they were not the property of the judgment debtor at the time of the seizure or sale, the purchaser does not acquire a good title to the goods as against the real owner. No one can dispute the soundness of that decision as a general proposition. No doubt in the absence of some statutory requirement it would be applied to a conditional sale vendor as well as any other owner. But in Ontario we have a statute intervening which precludes the conditional sale vendor who has failed to register from asserting his rights against a purchaser without notice in good faith and for valuable consideration.

In this province, as far as I can ascertain, the matter has not been judicially considered, although in Barron on Conditional Sales, 3rd ed., p. 40, it is stated that the law is as here suggested. The statement in Barron is based on certain American decisions. Besides those mentioned in the text, I should make reference to certain others dealt with by Mr. Brooks in argument, namely, *Harris v. Gunn*, 77 N.Y.S. 20; *Pugh v. Highley* (1899), 53 N.E.R. 171; *F. A. Ames & Co. v. Slocomb Mercantile Co.* (1910), 51 So. 994, and *Gober Motor Co. v. Valley Securities Co.* (1929), 124 So. 395 (Ala.). Reference also to 55 Corpus Juris, at p. 1244 and p. 1250.

The Conditional Sales Act provides ample protection to conditional sale vendors like this plaintiff provided they comply with the Act. If they do not see fit to do so, then the protection is taken away as against subsequent purchasers or mortgagees without notice in good faith and for valuable consideration claiming under the conditional vendee. I am unable to see that there should be any difference in principle whether the sale is made by a sheriff or bailiff or by the conditional vendee himself. In this case the whole trouble arose by reason of the plaintiff failing to protect itself by compliance with the statute. It does not arise through any fault or neglect on the part of the defendant. In such a situation the sanction for non-compliance is set up by the statute itself. The plaintiff who had failed to comply has simply lost his right to assert the ownership, which was his as far as Teakle was concerned, against this defendant.

I would affirm the judgment below, and dismiss the appeal with costs.

ROBERTSON C.J.O. (dissenting):—An appeal from the judgment of Judge Livingstone, dated 29th June, 1939, after the trial of an action in the County Court of the County of Welland.

The material facts are, briefly, these:—On 8th June, 1938, Mills Motor Sales agreed to sell to one Robert Teakle a Ford sedan, under the terms of a contract in writing, which provided, *inter alia*, that the title and ownership in and to the motor vehicle should remain in the vendor until the entire purchase price and interest and costs were fully paid in cash. The contract contained an agreement that the purchaser would not part with the possession or control of the motor vehicle, and further provided that on default in due payment of any of the sums mentioned or breach of any of the covenants or agreements therein contained, or in certain other events mentioned, the entire unpaid deferred balance should forthwith become due and payable, and that the seller might, with or without legal process, take immediate possession of the motor vehicle. The unpaid balance owing by the vendee was fixed by the agreement at \$337.50, to be paid in monthly instalments. No copy of this agreement was filed in the office of the Clerk of the County Court at any time. After making several payments Teakle became in default in respect of the payment due on 8th December, 1938. The balance of the purchase price then remaining unpaid was \$245.25.

Mills Motor Sales, the original vendor, assigned to appellant on 8th June, 1938, all its right, title and interest in and to the conditional sales agreement, and in and to the motor vehicle, and Teakle made all his monthly payments to appellant.

In October, 1938, one Joyce obtained a Division Court judgment against Teakle for debt and costs, amounting to \$58.57, and an execution against Teakle's goods was issued to the Division Court bailiff on 7th January, 1939. On 18th January, 1939, respondent recovered a judgment against Teakle in the same Division Court for debt and costs, amounting to \$59.87, and an execution against Teakle's goods was issued under this judgment to the same bailiff. Under these executions against the goods of Teakle the bailiff seized the motor vehicle in question and a piano and a radio, and advertised them for sale by public auction. On 28th January, 1939, he sold, or assumed to sell, the motor

vehicle to respondent's agent for \$135.00, and delivered the motor vehicle to him. The learned County Court Judge has found that respondent's purchase of the motor vehicle at the bailiff's sale was made in good faith, for value and without notice. This finding may be accepted, but there is uncontradicted evidence that the bailiff was told of appellant's lien at the time of seizure.

Upon appellant learning of the seizure and sale, it demanded from respondent either possession of the motor vehicle or payment of the balance owing under the conditional sale agreement, and on respondent refusing both, this action was brought for damages for conversion, or, in the alternative, delivery of possession of the motor vehicle. The learned County Court Judge dismissed the action, holding that respondent is a subsequent purchaser of the motor vehicle, claiming from or under Teakle within the meaning of sec. 2, subsec. (1) of The Conditional Sales Act, R.S.O. 1937, ch. 182.

I am unable to agree with the judgment of the learned County Judge. As it appears to me, the plain effect of his judgment is to add the creditors of a conditional purchaser as a class to be benefited by the subsection referred to in the face of its express terms, which are confined to subsequent purchasers and mortgagees. Creditors are protected by the statute only in the exceptional case provided for in subsec. (3) of sec. 2. As the matter is of some general importance, I shall deal first with the situation as it would be, apart from the statute, in the case of a sale by a sheriff or bailiff under execution against the goods of the conditional purchaser, and shall then consider the effect of the statute.

At common law a conditional sale agreement of goods was a valid contract and had effect according to its terms. Under execution against the goods of the conditional purchaser the goods themselves could not be seized nor sold. By virtue of sec. 18 of the Execution Act, R.S.O. 1937, ch. 125, the interest of the conditional purchaser in the goods might be sold under execution, and even if the sheriff or bailiff assumed to sell the goods themselves, the interest of the conditional purchaser is all that a purchaser from the sheriff or bailiff could acquire at such a sale. He acquires no title to the goods themselves as against the real owner: *Crane & Sons v. Ormerod*, [1903] 2 K.B. 37; *Gunn v. Burgess* (1884), 5 O.R. 685. In circumstances such as

in this case, the conditional purchaser having lost the right to possession by his default in payment, and also by the breach of his agreement not to part with possession, which breach arose on seizure by the bailiff, a purchaser at the bailiff's sale could not even be put in rightful possession of the goods—see *Snetzinger v. Leitch* (1900), 32 O.R. 440, at p. 445; *Re Phillips and La Paloma Sweets Limited* (1921), 51 O.L.R. 125, at p. 127.

The sheriff or bailiff who seizes and sells under execution against the goods of the conditional purchaser, goods the ownership and right to possession of which is in the conditional vendor, commits a tortious act, and the latter may bring against him an action of trover or conversion: *Jelks v. Hayward*, [1905] 2 K.B. 460; *Sanderson v. Baker* (1772), 3 Wils. K.B. 309; *Manders v. Williams* (1849), 4 Ex. R. 339.

The original vendor may elect to recognize the sheriff's or bailiff's sale as conferring title on the purchaser. In England, by sec. 15 of the Bankruptcy and Deeds of Arrangement Act, 1913, when goods in the possession of an execution debtor at the time of seizure are sold by the sheriff without claim having been made to them, both the sheriff and his purchaser are protected. In any such case, however, the true owner of the goods may recover from the execution creditor whatever of the proceeds he may have received, as money had and received to the use of such owner: *Jones Bros. (Holloway) Ltd. v. Woodhouse*, [1923] 2 K.B. 117. We have no statute in this Province similar to that referred to.

It is plain from what has been said that unless the law of this Province is changed by statute, a sheriff or bailiff, who, having an execution against the goods of a conditional purchaser, seizes and sells goods, the title to which is in the conditional vendor, commits a wrongful act. He is liable in damages to the conditional vendor, and the purchaser from the sheriff or bailiff acquires no title to the goods as against the conditional vendor.

I can find nothing in the Conditional Sales Act that in any way alters the law in this respect. A conditional sale agreement remains valid as against the creditors of the conditional purchaser (except as provided in subsec. (3) of sec. 2) whether the agreement is filed or not. The statute does not in any case make it lawful for the conditional purchaser or for anyone else to sell the property of the conditional vendor. What the statute does

is, in certain circumstances, to protect subsequent purchasers and mortgagees against the consequences of an unlawful sale.

A sheriff or bailiff having an execution against the goods of the conditional purchaser is not even mentioned in the statute, any more than is a landlord's bailiff distraining for rent. See *Carroll v. Beard* (1895), 27 O.R. 349. Nor are purchasers from a sheriff or bailiff mentioned. The only subsequent purchasers and mortgagees who are protected by the Act are purchasers and mortgagees of the goods themselves who claim from or under the conditional purchaser. The conditional purchaser had nothing to do with the bailiff's sale of the motor vehicle in this case. It was simply an unwarranted sale by the bailiff—a wrongful act for which he and he alone is responsible.

An argument was presented on behalf of respondent, which, with respect, I venture to think unsound, based upon the power of the bailiff to sell whatever equity Teakle had in the motor vehicle. It was argued that a sale of Teakle's equity by the bailiff would be a valid sale of that equity whatever the equity might be, and that thereupon the statute would come into operation and prevent appellant from asserting his title as owner. It was argued that that is the way the statute operates when the conditional purchaser himself sells the goods. It seems to me that this is based upon a misconception of the statute and a failure to distinguish between a sale of the equity of the conditional purchaser and a sale of the goods themselves. A subsequent purchaser or mortgagee to come within the protection of sec. 2 must be a purchaser or mortgagee of the goods themselves and not of a mere equity or interest of the conditional purchaser. The operation of the statute in the cases to which it applies is not to add something to a valid sale of the conditional purchaser's equity. The Act has nothing whatever to say about a sale or mortgage of the conditional purchaser's equity by the conditional purchaser. A purchaser of that equity acquires nothing more than the equity he purchases, nor is there any conceivable reason why he should have more. Likewise, when a bailiff sells the equity of the conditional purchaser under execution against the goods of the conditional purchaser, the purchaser at the bailiff's sale gets nothing but that equity. What the statute deals with is a sale of the goods themselves, and its purpose is to make valid an otherwise invalid sale in the case of

an innocent purchaser for value claiming from or under the conditional purchaser. When the bailiff wrongfully sells the goods, the title to which is in the original vendor, the statute is silent. The purchaser at a sale by the bailiff of the original vendor's goods is not one claiming the goods from or under the conditional purchaser. He claims the goods only from or under the bailiff, whose wrongful act it was to sell them. I know of no principle upon which the wrongful act of the bailiff can be related to the conditional purchaser and entitle the purchaser of the goods from the bailiff, who unlawfully sells them, to say that he claims the goods from or under the execution debtor, who never owned them and had nothing to do with the sale of them. It is to be noted that by its statement of defence respondent makes no claim as a purchaser from or under Teakle but sets up only the sale by the bailiff.

The purpose of the Act is, in my opinion, foreign to respondent's contention. It is the possession of the goods delivered by the original vendor to the conditional purchaser that is the foundation for the protection given by the statute, at the expense of the original vendor, to an innocent subsequent purchaser for value from or under the conditional purchaser. Nothing of that character is present when the bailiff sells under execution against the goods of the conditional purchaser. When the bailiff sells, the only possession that matters is the bailiff's possession, for a prior seizure by the bailiff is essential to the sale. The goods need not be, and, as everyone knows, frequently are not, found by the bailiff in the debtor's possession. Property in the debtor and not possession is the essential to a valid seizure and sale by the bailiff. There is no ground, therefore, for protecting a purchaser at the bailiff's sale against a false appearance of ownership by the debtor, arising from his possession of the goods.

In several of the Provinces where a statute similar to our Conditional Sales Act is in force, creditors of the conditional purchaser are expressly included with subsequent purchasers and mortgagees as persons entitled to the benefit of the statute. In Ontario, however, not even a trustee in bankruptcy or a liquidator under The Winding-up Act takes anything more than the interest of the conditional purchaser. The only reported cases in this Province dealing with the matter of a sale under execution

against the goods of the conditional purchaser that I have found are in accord with the opinion I have expressed—see *Pineo v. Bell* (1923), 25 O.W.N. 55; *Bank of Hamilton v. Mervyn* (1909), 14 O.W.R. 132, the latter being the decision of a District Court Judge. The effect of the judgment in appeal being, in my opinion, to add the creditors of the conditional purchaser to the classes protected by sec. 2, subsec. (1), of the statute, it should be set aside, and the appellant should either be declared to be entitled to possession of the motor vehicle or to recover its value, fixed at \$250.00, which, on the admission of respondent's President and Manager, is a proper sum. Appellant should also have the costs of the action and of the appeal.

Appeal dismissed with costs, ROBERTSON C.J.O. dissenting.

[COURT OF APPEAL.]

Gooderham & Worts Ltd. v. Canadian Broadcasting Corporation.

Crown—Emanation from the Crown—Status of Canadian Broadcasting Corporation—Action for breach of contract—Whether action lies—Whether Exchequer Court of Canada has exclusive jurisdiction.

The plaintiff brought this action for specific performance of an agreement for a lease and for damages for breaches of covenants in the lease and for conversion of property by the defendant. The defendant contended that the action would not lie against it on the grounds that it is an emanation of the Crown and can only be proceeded against in the Exchequer Court of Canada.

Held, that the action would lie in the Supreme Court of Ontario for the following reasons. The defendant is an emanation of the Crown and by The Canadian Broadcasting Act, 1936, 1 Edward VIII, ch. 24, sec. 4, it is provided that the defendant shall be a body corporate having capacity to contract and to sue and be sued in the name of the corporation. Thus in an action founded in contract, the defendant can be sued and since under sec. 8 of the Act the defendant has power to make contracts throughout Canada, the reasonable inference is that it was contemplated that it could be sued in a forum where the contract could be made just as any other party to a contract could be sued.

AN appeal by the defendant from an order of The Master dismissing a motion by the defendant for an order setting aside the writ of summons and the service thereof.

The appeal was heard by JEFFREY J. in Chambers at Toronto. *John Jennings*, K.C., for the defendant, appellant.

W. J. Palmer, for the plaintiff, respondent.

April 26th, 1939. JEFFREY J.:—An application was made to the Master in Chambers for an order striking out the writ of

summons issued herein and setting aside the service thereof on the defendant upon the grounds that:

First—the said defendant may not be sued in the ordinary course but that any claim against the said defendant must be by a petition of right.

Second—no cause of action existed at the date of the issue of the writ of summons.

Third—no cause of action is set forth in the writ of summons.

On the 30th day of April, the writ of summons herein was issued, claiming:

(a) Specific performance of a lease made as of the 15th day of May, 1933, between the plaintiffs and the Canadian Radio Broadcasting Commission and of the covenants therein contained; for the performance of which lease and covenants the defendant is liable and which covenants include *inter alia* a covenant to keep the whole of the demised premises modern and up-to-date and in good repair and operating condition.

(b) Damages—the sum of \$250,000.00 for breach of the said covenants and for conversion of property of the lessor which the lessee and the defendant removed from the demised premises and converted to their own use.

(c) Such further and other relief as to this Honourable Court may seem meet.

The writ of summons was duly served and no appearance was entered thereto, counsel for the defendant moving to strike out the writ of summons and set aside the service thereof. The Master refused the motion to set aside the writ and service and an appeal was taken from his judgment.

On the argument before the Master, counsel for the defendant contended that the defendant is an emanation of the Crown and, as such, cannot be sued, except by way of petition of right under The Exchequer Court Act, R.S.C. 1927, ch. 34, secs. 18 and 19.

It appears that the defendant Corporation acquires its powers under The Canadian Broadcasting Act, 1936, 1 Edw. VIII, ch. 24. Section 4 of this Act provides:

“The Corporation shall be a body corporate having capacity to contract and to sue and be sued in the name of the Corporation.”

It is under this section of the Act the plaintiff brings action.

Counsel for the defendant, on his argument before me, contended that the Master erred when he refused to determine the question as to whether the plaintiff had a right of action on the writ of summons as endorsed, holding that the motion was premature and that the points raised on the motion should not be dealt with until pleadings had been delivered defining the issues; when pleadings were delivered the question could be dealt with under Rules 122 and 124.

Section 18 of The Exchequer Court Act reads as follows:

"The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown."

Section 19:

"The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:

(a) Every claim against the Crown for property taken for any public purpose;

(d) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council."

Since this motion by way of appeal from the Master was heard by me the Court of Appeal decided in an appeal from His Honour Judge Parker that the Canadian Broadcasting Corporation was an emanation of the Crown and adopted the reasoning of the learned County Court Judge. This judgment is binding upon me.

At the close of the argument, I intimated I was of opinion that the case of *Halifax v. Halifax Harbour Commissioners*, [1935] S.C.R. 215 governed, and that the defendant Corporation was an emanation of the Crown.

The Master, in his reasons for judgment, held that the points raised should not be dealt with until the pleadings had been delivered defining the issues. Satisfying myself that the defendant Corporation is an emanation of the Crown, I cannot see what good purpose would be served by not now determining whether or not this action should be allowed to proceed until plead-

ings are delivered, for it seems obvious to me that the action (if in fact the defendant Corporation is an emanation of the Crown) would have to be dismissed, and I think the proper course was adopted in this case when the defendant immediately moved to set aside the writ.

Section 18 of The Exchequer Act, before referred to, reads:

“The Exchequer Court shall have exclusive original jurisdiction . . . in cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.”

Here specific performance of a lease is asked for, and damages for breach of the covenants contained in the said lease, and for conversion of the property of the lessor. The language of sec. 18 of The Exchequer Court Act is imperative.

In *Peccin v. Lonagan and T. & N.O. Railway Commission*, [1934] O.R. 701, one of the findings of the Court of Appeal was to the effect that the provisions of The Interpretation Act that a body corporate may sue and be sued and the further provision of the incorporating Statute do not affect the immunities of the Crown. Consequently, the section invoked by the plaintiffs, namely, sec. 4 of ch. 24 of the Statutes of Canada, 1 Edward VIII, 1936, is not helpful to the plaintiffs. Undoubtedly, the defendants can be sued, but that action must be brought in the Exchequer Court and proceed by way of petition of right; that the King cannot be impleaded in his own Court is a principle thoroughly recognized and set forth in all the text-books. The case most frequently cited is *Young v. S.S. Scotia*, [1903] A.C. 501.

The appeal from the Master must be allowed and the writ of summons and service thereof be set aside, with costs to the defendant Corporation of the motion before the Master and in appeal.

The plaintiff, pursuant to leave granted by Hogg J., appealed from the order of Jeffrey J.

September 13th, 1940. The appeal was heard by RIDDELL, McTAGUE and GILLANDERS JJ.A.

W. J. Palmer, for the plaintiff, appellant.

John Jennings, K.C., and *R. D. Jennings*, for the defendant, respondent.

September 14th, 1939. The written judgment of the Court was delivered by RIDDELL J.A.:—The plaintiff, a company doing

business in Toronto, brought an action against the defendant, and by writ bearing date April 30th, 1938, claimed

“(a) Specific performance of a lease made as of the 15th day of May, 1933.

(b) Damages in the sum of \$250,000.00 for breaches of the said covenants.

(c) Such further and other relief as to this Honourable Court may seem just.”

The defendant, instead of entering an appearance, moved to set aside the writ and the service thereof on the ground that the only relief in the premises was by petition of right.

The Master in Chambers dismissed the application, whereupon the defendant moved before the Judge in Chambers and Mr. Justice Jeffrey allowed the appeal. Leave being obtained, an appeal was taken to this Court. The appeal was argued at some length and many cases were cited before us.

A statement of claim has been delivered, but the defendant, denying the jurisdiction of the Supreme Court of Ontario to deal with the matter, has not served a statement of defence, and the plaintiff is debarred from entering judgment.

The case is an intricate one and should receive careful consideration. After full consideration of the questions involved, I feel as did Viscount Finlay in the Judicial Committee in *Electric Development Company of Ontario v. Attorney-General for Ontario et al.*, [1919] A.C. 687, when, p. 695, he said: “The elaborate argument advanced . . . has failed to satisfy their Lordships that it is so clear that no declaration can be made against the Attorney-General under the circumstances of this case as to make it right that the action should be summarily stopped as against the Attorney-General. It will, of course, be open to him to allege as a substantive defence to the action that on the facts there was no justification in point of law for making him a party, but their Lordships do not think that this question ought to be decided until pleadings have been delivered”

The statement of claim having been delivered, the necessity of an appearance is done away with. I think the defendant should deliver its statement of defence, this being wholly without prejudice to its claim that this Court has no jurisdiction in the premises; and, when the issues are thus specifically defined, we will deal with the motion. Of course, the defendant may plead our want of jurisdiction; and we will deal with this point.

The statement of defence should be delivered within ten days. All questions of costs will be reserved until the final disposition of the matter.

Subsequently the defendant filed a statement of defence and counsel agreed that the Court should dispose of the appeal on the basis of the argument heard by the Court on September 13th, 1940.

On a subsequent date the Court delivered judgment.

October 10th, 1939. RIDDELL J.A.:—The plaintiff sues the defendant for specific performance of a lease and damages. The defendant moved before the Master for an order striking out the writ and setting aside the service thereof on the ground that the matter was not within the jurisdiction of the Court. On May 30th, 1938, the Master dismissed the motion. The defendant appealed and Mr. Justice Jeffrey allowed the appeal April 28th, 1939; leave to appeal being granted by Mr. Justice Hogg May 27th, 1939, the appeal came on before us September 13th, 1939, and we thought that the appeal should not be disposed of without the pleadings being completed. This has now been done, the defendant in no way submitting to the jurisdiction of the Court. We gave leave to the parties to adduce further argument, but they have agreed that the appeal may be dealt with without further argument.

The substantial ground for the objection to the jurisdiction of the Court is, of course, that the defendant, an “emanation” from the Crown is really for the purposes of litigation the Crown or stands in the same position as the Crown.

The question has come up for determination in the Courts of our sister Province of Quebec, and there decided against the contention of the defendant. The reasoning of the counsel against this contention, approved as it was by the Court, is to me so convincing that I think we must hold that the Court has jurisdiction: *Kristen v. Durieux and Canadian Broadcasting Corporation et al.* (1937), Que. R. 75 S.C. 268; see also *Societe Radio Canada v. Cyr* (1938), Que. R. 64 K.B. 1 and 191. With this may be compared a not dissimilar case in the Supreme Court of Canada, *Canadian National Railway Co. v. Croteau et al.*, [1925] Can. S.C.R. 384.

I think that the appeal must be allowed with costs throughout.

My reason, shortly stated, is that a corporation given full power to contract, and contracting, is liable to have its contracts dealt with by the ordinary Courts of the Province—save in very exceptional circumstances which do not appear here.

MCTAGUE J.A.:—This action was commenced by writ of summons in the Supreme Court of Ontario dated 30th April, 1938. The relief claimed was for specific performance of a lease made as of the 15th day of May, 1933, between the plaintiff and the Canadian Radio Broadcasting Commission, which the defendant is said to have assumed by virtue of sec. 25 of the Canadian Broadcasting Act, 1936, Statutes of Canada, 1 Edward VIII, ch. 24, and for damages for breaches of covenants in the lease, and for conversion of property of the lessor by the defendant.

The defendant did not enter an appearance, but on the 27th day of May, 1938, launched a motion before the Master to strike out the writ of summons upon the principal ground that the defendant was not liable to be sued in this Court and that any claim against it must be brought in the Exchequer Court of Canada by petition of right. The learned Master dismissed the motion following *Electrical Development of Ontario v. Hydro-Electric Power Commission*, [1919] A.C. 687, on the ground that the motion was premature and could only properly be determined after pleadings had been delivered on motion under Rules 122 or 124.

The defendant appealed from the order of the Master to the Honourable Mr. Justice Jeffrey in Weekly Court. In the result, the order of the Master was vacated and the writ of summons was set aside, the learned Judge holding in reasons delivered the 26th day of April, 1939, that this Court has no jurisdiction.

On the 27th day of May, 1939, the Honourable Mr. Justice Hogg granted leave to the plaintiff to appeal from the order of Jeffrey J. to this Court. After hearing argument, we reserved judgment until pleadings had been filed, and retained the motion. The direction of the Court as to filing pleadings has been complied with so that we now must dispose of the matter.

The point involved is simple to state but somewhat difficult to determine. The defendant takes the position that as an emanation of the Crown it can only be proceeded against in the Exchequer Court, and that this Court has no jurisdiction either as to person or the subject matter of the action.

This Court, differently constituted, has held that the defendant is an emanation of the Crown and as such is entitled to the same immunity as the Crown itself in respect of municipal taxation: *Re The City of Toronto and Canadian Broadcasting Corporation*, [1938] O.W.N. 507. We, of course, are bound by that decision and must take it as established that the defendant is an emanation of the Crown. Granting that it has such status, does it follow that the only Court having jurisdiction is the Exchequer Court of Canada?

The defendant corporation was brought into being by The Canadian Broadcasting Act, 1936, 1 Edward VIII, ch. 24. It is given very broad powers extending to the securing of programmes within or outside Canada, making contracts with persons inside or outside Canada in connection with the presentation of its programmes and establishing and subscribing to news agencies in any part of the world. I merely point out these matters as indicative of the kind and nature of the corporation which Parliament has created: see sec. 8. By sec. 4 it is provided that the corporation shall be a body corporate having capacity to contract and to sue and be sued in the name of the corporation. It is around this section that the whole controversy arises.

A somewhat similar situation was considered in *Peccin v. Lonegan and T. & N.O. Railway Commission*, [1934] O.R. 701. In that case it appeared that the T. & N.O. Railway Commission was created a body corporate and by virtue of The Interpretation Act, R.S.O. 1927, had power to sue and be sued. The Court held that the liability to be sued did not destroy the old constitutional right of immunity of the Crown in respect of tortious act of the Crown servants. Mr. Justice Davis was careful, however, to point out that it might be different in an action founded on contract.

It seems pretty definitely established that the Crown or an emanation of the Crown cannot be successfully sued in tort except possibly in very exceptional circumstances, but that it can be sued in contract. See *Graham v. Public Works Commissioners*, [1901] 2 K.B. 781; *Roper v. Public Works Commissioners*, [1915] 1 K.B. 45; *MacKenzie-Kennedy v. Air Council*, [1927] 2 K.B. 517; *Rattenbury v. Land Settlement Board*, [1929] S.C.R. 52; *McLean v. Vancouver Board*, [1936] 3 W.W.R. 657, and

Moore v. Federal District Commission of Ottawa, [1937] O.R. 200.

In Canada, however, there is a special forum provided. Section 18 of The Exchequer Court Act, R.S.C. 1927, ch. 34, provides, *inter alia*, that that Court shall have exclusive original jurisdiction in cases where the claim arises out of a contract entered into by or on behalf of the Crown. If a contrary intention is not provided or cannot reasonably be implied in the Canadian Broadcasting Act, then I think sec. 18 of the Exchequer Courts Act would govern.

I have pointed out already that under sec. 8 of the Canadian Broadcasting Act the corporation is given very wide powers, some of them specifically unlimited geographically. In addition pursuant to the powers it is given the right to contract in its own name and to be sued in its own name. In the very nature of its business, and having in mind the powers given it, one would reasonably assume that it could enter into contracts in any part of the world. From that I think it is a reasonable inference that it was contemplated that it could be sued in any forum where the contract could be made just as any other party to a contract could be sued. The very nature of its business and the powers given it incline me to the view that it is the very type of corporation that Phillimore J. had in mind when he said in *Graham v. Public Works Commissioners*, [1901] 2 K.B. 781, at p. 789: "The Crown cannot be sued; and, that being so, neither can the subject take action indirectly against the Crown by suing a servant of the Crown upon a contract made by the servant as agent for the Crown. A Crown servant making a contract for the Crown is no more liable than any other agent making a contract for his principal. But for facilitating the conduct of business it is extremely convenient that the Crown should establish officials or corporations who can speedily sue and be sued in respect of business engagements without the formalities of the procedure necessary when a subject is seeking redress from his Sovereign. It is desirable for the proper conduct of business that persons who contract with the Crown for business purposes should have the same power of appealing to His Majesty's Courts of Justice against a misconstruction of the contract by the head of a department as any subject might have against his fellow-subject. For that purpose the Crown has, with the consent of

Parliament, in certain cases established certain officials who are to be treated as agents of the Crown but with a power of contracting as principals.”

When I quote Phillimore J. I am not forgetting that there is no special forum for Crown cases in England corresponding with our Exchequer Court, but I think the same principle applies. It seems absurd to contend that Parliament could ever have intended that the Canadian Broadcasting Corporation was liable to be sued by its wage-earners, musical artists and other performers for wages or salaries, and that they could not exercise such right except upon recourse to a petition of right. As Mr. Justice McDougall observes in *Kristen v. Durieux and Canadian Broadcasting Corporation* (1937), Que. R. 75 S.C. 268, at p. 271: “Parliament would take away with one hand what it gives with the other.” See also *Societe Radio Canada v. Cyr* (1938), Que. R. 64 K.B. 1, and application for leave to appeal in the same volume at p. 191.

For these reasons it is my view that the action must proceed. The question of liability is for the trial Judge, and it is still open to the defendant to argue untrammelled by this judgment non-liability in either tort or contract either before or after the defence has been developed. I would allow the motion by way of appeal with costs to the plaintiff throughout and dismiss the motion before the Master.

GILLANDERS J.A. agreed with McTAGUE J.A.

Appeal allowed with costs.

[COURT OF APPEAL.]

Lockhart, et al. v. Stinson and The Canadian Pacific Railway Co.

Master and servant—Liability of master for torts of servant—Whether servant was acting in course of master's business at time of negligent act—Servant instructed by Master not to use servant's uninsured automobile in connection with the master's business—Plaintiff injured as result of negligent operation of servant's automobile.

The defendant S. was an employee of the defendant railway company and in the course of his employment it was his duty to make repairs of different kinds to the company's property. His headquarters were at the company's works at West Toronto and upon the occasion in question in this action he was instructed by his foreman to go to the North Toronto station to do certain work. The defendant company kept at West Toronto several types of track vehicles for the use of their employees in connection with their work. On this occasion, however, the defendant S. proceeded from West Toronto to the North Toronto station in his own motor car and while so travelling he injured the infant plaintiff and at the trial it was found by the jury that the injuries of the infant plaintiff were caused by the negligent operation by the defendant S. of his motor car.

The motor car of the defendant S. was not insured with respect to third party risks and the defendant company, prior to the accident, had issued two written notices to its employees forbidding its employees to use in the execution of the company's business motor cars which were not adequately protected by public liability insurance.

Held by the Court of Appeal, affirming the judgment of Rose C.J.H.C., reported in [1939] O.R. 517, McTague J.A. dissenting, that the defendant S. at the time of the accident was not acting within the scope of his authority; the defendant S. by driving his uninsured car violated the terms of his implied agreement of employment with the defendant company, disobeyed the prohibition of his employer and was guilty of wilful misconduct for his own convenience and purpose. The act of setting out on his journey in his uninsured car placed S. outside the scope of his authority, so that at the time of the accident he was acting not as a servant of the railway but as a stranger engaged on his own enterprise. Therefore, the defendant company was not liable to the plaintiff for the negligence of the defendant S. Review of the authorities dealing with the scope of a servant's authority and the liability of a master to a third person for the torts of a servant.

An appeal by the plaintiffs from the judgment of Rose C.J.H.C., reported in [1939] O.R. 517, whereby the action was dismissed as against the defendant The Canadian Pacific Railway Company.

November 16th and 17th, 1939. The appeal was heard by MIDDLETON, MASTEN, FISHER, MCTAGUE and GILLANDERS JJ.A.

D. J. Walker and J. L. McLennan, for the plaintiffs, appellants, pointed out that at the time of the accident the defendant Stinson was working for the defendant company and was going in a direct route from West Toronto to the North Toronto station; it was to the advantage of the defendant com-

pany for Stinson to save time, as he did, by travelling in his automobile.

The relationship between Stinson and the company was that of servant and master, not agent and principal: *Bright v. Kerr*, [1939] S.C.R. 63.

When the accident occurred Stinson was acting within the scope of his employment and doing what he was employed to do, namely, going to fit a key in a lock at the North Toronto station in furtherance of his master's business, for his master's benefit and under his master's control as to what and how he was to do it. Therefore the defendant company is liable to the plaintiffs: *Bugge v. Brown* (1919), 26 Commonwealth Law Reports 110; *Goh Choon Seng v. Lee Kim Soo*, [1925] A.C. 550.

The defendant company, having allocated certain types of work or functions to Stinson and receiving benefits therefrom can not avoid liability to the public and to the plaintiffs by secret instructions or restrictions as to the mode or the manner in which the work should be done: *Baty on Vicarious Liability*, 108; *Plumb v. Cobden Flour Mills*, [1914] A.C. 62; *Jarry v. Pelletier*, [1938] 2 D.L.R. 645; *Limpus v. London General Omnibus* (1862), 1 H. & C. 526; *Pierce v. Provident Clothing Supply Co.*, [1911] 1 K.B. 997; *Bailey v. Manchester Railway* (1873), L.R. 5 C.P. 148.

W. N. Tilley, K.C., and *J. Q. Maunsell*, K.C., for the defendant Canadian Pacific Railway Company, respondent, contended that the appellants had failed to establish that the accident was caused by Stinson while acting within the scope of his employment. Stinson was expressly forbidden by the respondent to use his own uninsured motor car while attending to the respondent's business and thus at the time of the accident Stinson was not acting within the scope of his employment: *Bright v. Kerr*, [1939] S.C.R. 63; *Stretton v. The City of Toronto* (1887), 13 O.R. 139; *Boyd v. Smith*, [1931] O.R. 361; *Stephen v. Cooper*, [1929] A.C. 570; *Baker v. Bradford* (1916), 114 L.T. 1144; *Brice v. Lloyd*, [1909] 2 K.B. 804; *Dallas v. Hinton*, [1938] S.C.R. 244.

The damages found by the jury were grossly excessive and on the evidence were much less than \$5,000.00, the amount originally claimed. Moreover the learned trial Judge erred in amending the statement of claim following the answers of the

jury; the amount of damages claimed is an essential part of the statement of claim: Rule 145.

In any event the plaintiffs having taken judgment against Stinson and having issued execution on that judgment, are not entitled now to judgment against the respondent. The plaintiffs' cause of action is merged in the judgment issued and entered against Stinson.

Cur. adv. vult.

December 15th, 1939. MIDDLETON J.A.:—An appeal from the judgment of the Chief Justice of the High Court dismissing an action against the defendant Canadian Pacific Railway for damages for negligence in the operation of a motor car, whereby the infant plaintiff suffered concussion of the brain. The motor car was operated by the defendant Stinson, who, it is alleged, was acting within the scope of his employment as a servant of the Canadian Pacific Railway.

The facts connected with the accident and this appeal are all so fully set forth by the learned Chief Justice and by the Honourable Mr. Justice Masten, whose judgment I have had the privilege of reading and in which I concur, that they do not require to be again set forth.

I desire, however, to deal with two of the questions argued not dealt with by Mr. Justice Masten.

The general rule as to the liability of the master for his servant's negligence is thus stated. The principle is that: " . . . the principal is the person who has selected the agent, and must therefore be taken to have had better means of knowing what sort of a person he was than those with whom the agent deals on behalf of his principal; and that, the principal having delegated the performance of a certain class of acts to the agent, it is not unjust that he, being the person who has appointed the agent, and who will have the benefit of his efforts if successful, should bear the risk of his exceeding his authority in matters incidental to the doing of the acts the performance of which has been delegated to him." *Hamlyn v. Houston & Co.*, [1903] 1 K.B. 81, per Collins M.R., at p. 85.

The difficulty here to be considered does not arise out of the liability of the master, but it is necessary to determine the exact nature of the liability of the master and servant. Both

master and servant are unquestionably liable in the first instance. Both master and servant were here sued. A judgment has been pronounced against the servant and dismissing the action as against the master, and not only has the judgment been pronounced but the plaintiff has acted upon it, caused it to be entered up and caused attachment proceedings to be taken against the servant on this judgment, and small sum of money has been recovered on these attachment proceedings. Mr. Tilley's objection is that this precludes the right of the plaintiff to seek now to recover against the master.

The liability of the master and the servant, it has been determined, is a joint liability. *Stephens v. Elwall* (1815), 4 M. & S. 259. There Lord Ellenborough determined the question of the liability of a servant for conversion where he acted in obedience to orders of his master. Lord Ellenborough says, at p. 261:

"The Court is governed by the principle of law, and not by the hardship of any particular case. For what can be more hard than the common case in trespass, where a servant has done some act in assertion of his master's right, that he shall be liable, not only jointly with his master, but if his master cannot satisfy it, for every penny of the whole damage; and his person also shall be liable for it; and what is still more, that he shall not recover contribution."

This case was decided in 1815, but the situation was reviewed in the House of Lords in 1875 in *Hollins v. Fowler* (1874), L.R. 7 H.L. 757, where the House of Lords after hearing all the Judges approved of and affirmed *Stephens v. Elwall*.

If the Canadian Pacific Railway became liable with Stinson for Stinson's negligence, their liability was therefore a joint liability and falls within the principles of *King v. Hoare* (1844), 13 M. & W. 494, and *Kendall v. Hamilton* (1879), 4 App. Cas. 504. There an action was brought upon a joint contract. Two of three liable on this contract were made parties defendant and judgment was recovered against them. Afterwards the plaintiffs ascertaining the existence of the defendant and his liability, it was held that the action against him could not be maintained, the contract having passed into a judgment. This decision was founded on the earlier case of the *King and Hoare* which was adopted in its entirety.

Since other and somewhat similar cases have arisen, they have been equally rigid in the application of the principle. I refer particularly to the decision in *Morel Bros. & Co., Ltd. v. Earl of Westmorland*, [1904] A.C. 11. There a husband and wife were sued upon a contract made, it was said, by a wife on behalf of her husband and herself. The wife submitted to summary judgment. The plaintiff proceeded against the husband. Lord Halsbury in the House of Lords said, at p. 14: "They cannot get judgment against the principal also. It is an alternative remedy. It cannot be made available against the two."

It was also in that case argued that the rule relating to summary judgment, under which the judgment had been obtained against the wife, contained an express provision enabling the action to proceed against the other defendant, but to this it was answered in the Lords that the rule did not apply to the case of an alternative liability. Therefore if the claim is against two defendants as alternatively liable and the judgment is signed against one, the rule does not enable the plaintiff to proceed against the other.

I refer particularly to the judgment in the Court below, [1903] 1 K.B. 64, as containing the theory upon which it was sought to maintain the action. Here the case of *Kendall v. Hamilton* constitutes the defendant's sheet anchor. There the case of *Scarfe v. Jardine* (1882), 7 App. Cas. 345, was relied upon.

In the result if I am not right in concurring with Mr. Justice Masten, I am afraid that *Kendall v. Hamilton* is a complete answer to this appeal.

Another technical question was raised which I think merits consideration. The plaintiff (infant) was given \$10,000 damages. His claim in the action was for \$5,000 only. The defendant Canadian Pacific Railway went to trial knowing that this was the amount claimed. They governed themselves accordingly. After the jury had brought in its verdict and the case was no longer before the jury, the pleading was amended so as to make the claim \$10,000. Was this course justified? I think not. Our Rule differs from the English practice. It was amended in 1913 and is now found as 145. This rule provides that every statement of claim and counterclaim shall state

specifically the relief claimed, either simple or in the alternative, and may ask for general relief. When damages are claimed the amount shall be named. The intention of this rule was that a plaintiff should take the responsibility of naming the amount of his claim. If the plaintiff found that his injuries were more serious than he supposed, he could, of course, have obtained an amendment, and that amendment must be made before the trial. The course which would be taken by the person from whom the damages were claimed would depend, to some extent at any rate, upon the amount of the claim. If the injured plaintiff claimed \$5,000 and this appeared not to be an unreasonable claim if the plaintiff is entitled to recover, the defendant would not prepare to resist it with the same zeal and energy as he would be prepared to resist a \$25,000 claim.

The claim put forward by the plaintiff is the claim that is submitted to the jury, and the jury, I think, could not without an amendment give more than the plaintiff claimed. This was in fact recognized by the parties at the trial for the trial Judge made an amendment retrospective in its operation, by which the claim was amended from \$5,000 to \$10,000 and the jury was treated as having pronounced upon it. The jury, in fact, had not before them any claim other than that put forward in the pleadings when they gave their verdict. On that alone they were entitled to pronounce.

Rule 183, the Rule permitting amendments, does not expressly govern this case. I do not desire to do more than express my dissent from the view that it justifies an amendment at this stage upon the vital matter of the amount of damages. I am not certain that this question is open to be now discussed in view of the decision in *White v. Proctor, et al.*, [1937] O.R. 647. Mr. Justice Henderson purports to act upon an unreported case recalled by Mr. Justice Riddell. The date of the decision does not appear to have been regarded as important. It may have been prior to the amendment in 1913.

The Honourable Chief Justice Rose made the amendment at the trial apparently somewhat reluctantly, but he tells me that he does not regard the amount awarded as unreasonable. If the jury had any power to award this sum it does not appear to me to be unreasonable. The whole situation is, in view of the medical evidence, unsatisfactory and full of doubt. The boy may recover perfectly, or he may be a life long invalid.

These questions are quite beside the judgment of Mr. Justice Masten in which I have already expressed my concurrence.

The result of reading numerous cases convinces me that almost all turn upon the particular view taken of the facts by juries. It is impossible from these cases to evolve any general principle beyond this—that the master is liable for that which is done by the servant within the terms of his hiring, and I think where the master expressly stipulates, as I think the master here did, against the use of uninsured motor cars, this servant, whose employment did not generally require him to use an automobile or to leave the master's premises, cannot impose a liability beyond that which was voluntarily assumed by the master.

In my opinion the appeal should be dismissed.

MASTEN J.A.:—This is an appeal by the plaintiffs from the judgment of the Chief Justice of the High Court delivered on the 11th day of July, 1939, dismissing the action of the plaintiffs as against the defendant The Canadian Pacific Railway Company.

The judgment, from which the appeal is taken, recites that the jury having answered certain questions, "This Court was pleased to direct that judgment be (now) entered for the plaintiffs against the defendant Stinson and that the issue between the plaintiffs and the defendant Canadian Pacific Railway Company and the Third Party issue should stand over for judgment", and thereafter on the date above mentioned did order and adjudge that the plaintiffs' action be, "and the same is hereby dismissed as against the defendant Canadian Pacific Railway Company with costs to be paid by the plaintiffs to the said defendant forthwith after taxation."

I find myself unable either to condense or to improve in any way upon the clear and succinct statement of facts as they are detailed in the reasons of judgment of the learned trial Judge, and for convenience I incorporate them here:

"This is an action for damages for personal injuries sustained by the infant plaintiff when he was struck by a motor-car owned and driven by the defendant Stinson and for expenses incurred by the adult plaintiff, the infant's father, as a result of the injuries. The jury found that the injuries were caused by Stinson's negligence, and judgment was directed to be entered

against him for the damages assessed. What remains to be determined is whether Stinson's employers, the defendant company, are liable also. As to this, no question was left to the jury, because the facts upon which the question turns are not in dispute and the question is one of law.

"The defendant Stinson had been for many years in the defendant company's service. It is in the course of his employment to make repairs of many kinds to the company's property, movable and immovable. His immediate superior is the foreman of the bridge and building department at the company's works at West Toronto, and his own headquarters are at those works, but his duties take him from time to time to other premises of the company in and out of Toronto, all of which can be reached by the company's lines of rails.

"At West Toronto, Stinson had made a key for use in a lock in the station at North Toronto. He had made it from a pattern, and he was authorized or instructed by his foreman to go to North Toronto and try it in the lock. He is paid by the hour, and would have been paid for the time occupied in the journey.

"The company keeps at West Toronto vehicles of three types for the use of the employees in connection with their work; a 'speeder', a 'track-motor', and a 'hand-car', all of which run on the company's rails; and sometimes, when it is more convenient, a man proceeding from one part of Toronto to another is instructed or permitted to travel by tram-car and is furnished with tickets. On this occasion nothing was said as to how Stinson was to get to North Toronto; but the track-motor foreman assumed that the track-motor would be used. Stinson, however, had a motor-car of his own nearby, and, without communicating his intention to anyone, he decided to use it. He did use it, and on his way to North Toronto he injured the infant plaintiff.

"The company, by its divisional superintendent, and over his signature, had issued two notices concerning the use by its employees of privately owned motor-cars in connection with the company's business. The first, dated December 28, 1937, was as followed:

'All Concerned:

'The use by employees of their own cars in connection with the company's business has been forcibly brought to our atten-

tion by possible heavy claims against the company in recent accidents, and, after a check up of the situation it develops that a large number of such employees do not carry public liability or property damage insurance. As a continuance of this practice is likely to seriously involve the company, privately owned automobiles are not to be used in connection with the company's business unless the owner carries insurance against public liability and property damage risks.

'Please be governed accordingly.' "

and the second, dated March 21, 1938 (i.e., just less than four months before the accident which gave rise to this action), was as follows:

" 'All Concerned:

'Referring to my circular letter of December 28th, 1937, regarding the use of privately owned automobiles not covered by insurance in the execution of company's business.

'Since then, several instances have come to notice where employees had used unprotected automobiles contrary to the instructions. In one case, a telegraph messenger undertook to use an automobile while his bicycle was undergoing repairs, and had the misfortune to strike and injure a prominent citizen. As a result, a heavy claim has been preferred against the company on the grounds that the messenger was transacting company's business at the time.

'It is a serious matter to involve the company in expenditures of this nature, and all concerned must clearly understand that automobiles not adequately protected by insurance must not be used in the execution of company's business.

'Will you kindly take whatever steps are necessary to see that the instructions in this regard are being adhered to.' "

"Copies of these notices had by the foreman at West Toronto been read to his men, including Stinson, and had been posted up and left posted in a prominent place for all to see; and Stinson's attention had very directly been called to the order on one occasion when an act of disobedience on his part had come to the foreman's attention. This one breach of the order by Stinson seems to have been the only breach on the part of any of the men who were under the orders of the foreman at West Toronto which had come to his (the foreman's) attention; and there is no possibility of a finding that the company or any

of Stinson's superiors in the company's service had winked at the non-observance of the rule. Had there been evidence upon which such a finding could be based, a question as to the fact would have been submitted to the jury. Stinson carried no insurance, and when he set out for North Toronto in the uninsured car he knew he was doing what he had been forbidden to do."

I add to the above an extract from the evidence at pp. 298 and 299 of the cross-examination of Stinson.

"Q. You chose, however, carrying out their duties, to drive your own car? A. No; it was for my own convenience.

"Q. Just for your own convenience; it was easier to get up there that way was it? A. It was the quickest way, because it was not a very big job to do.

"Q. Would it have been convenient to have hopped on the jigger that morning? A. Yes, I could have.

"Q. Well, why didn't you take the jigger? A. Well, it was more convenient for me to use my car.

"Q. Exactly. And the electric car that you use, why didn't you use it instead of your automobile? A. The same thing applies.

"Q. The same thing applies. In fact, the same thing applied to all the modes of conveyance: it was more convenient to use your own car, wasn't it? A. Yes."

On this appeal three questions were presented for consideration. The first was a preliminary objection that, as the plaintiffs had signed judgment against the defendant Stinson, on January 30th, 1939, and had subsequently enforced it by attachment proceedings, the cause of action, if any, as against the respondent company, an alleged joint tortfeasor, was thereby abandoned and lost.

The second question was the appellants' contention that the negligence of Stinson occurred in the course of his employment in such manner and under such circumstances as to render the respondent company liable for Stinson's negligence.

The third question was the submission of the respondent that the learned trial Judge erred in ordering that the plaintiffs might increase the damages claimed by the infant plaintiff to \$10,000 so as to accord with the verdict of the jury, though no more than \$5,000 had been claimed in the writ and statement of claim.

I proceed to deal with the second question. It is well settled that the act must be shown to be within the scope of the servant's authority, as being at least an act which was incidental to his employment, and unless this is established, the action against the master will fail: *Ruddiman & Co. v. Smith & Others* (1889), 60 Law Times 708; *The London General Omnibus Co. v. Booth* (1893), 63 L.J. (Q.B.) 244; Smith on Master and Servant 8th ed., pp. 234, 235.

The contention of the appellants is that going from West Toronto to North Toronto for the purpose of fitting the key which Stinson carried in his pocket was essential to the duty which he was ordered to perform, and that moreover his time in going to North Toronto was paid for by the respondent. Further, that he was not precluded by the orders of the respondent from going in his own motor, provided it was properly insured, and that the respondent cannot escape responsibility on the ground that it had forbidden Stinson to go in the manner which resulted in the accident, that is, in his uninsured motor. It was his duty to go to North Toronto, and a limitation on the manner of his going cannot relieve the respondent.

The respondent's submission is that at the time when the accident occurred Stinson was acting outside the "scope of his authority" for his own convenience and contrary to the express terms under which he was employed; also, that in driving his uninsured car in breach of his master's orders he was guilty of wilful misconduct for his own purpose.

As a preliminary observation respecting the phrase "scope of authority", I refer to the words of Hudson J., in delivering the judgment of the Court in the case of *Dallas v. Home Oil Distributors Ltd.*, [1938] S.C.R. 244, at p. 252:

"The question whether a given act of an employee is within the scope of his employment, in the sense in which that phrase is used for the purpose of determining the employer's liability to third persons, is, strictly, not the same question as the question whether an injury received by an employee at a given moment in given circumstances was an injury received in the course of his employment for the purposes of applying the Workmen's Compensation Act. Nevertheless, judicial reasoning in respect of the latter class of questions may be, and in the circumstances of this case is, valuable and illuminating."

I think, however, that the cases under the English Workmen's Compensation Act, when referred to, ought to be applied with the greatest caution; for the categorical imperative of the statute defining the ambit of "scope of employment", and so rendering the master liable to the servant himself, may be and often is widely different from the "scope of authority" which, in common law cases of injury to third parties, is fixed by the agreement between the master and the servant and which varies with the differing facts and circumstances of each particular case.

In that connection I quote the words of Lord Dunedin in the case of *Plumb v. Cobden Flour Mills Co. Ltd.*, [1914] A.C. 62, at p. 65, which was a case arising out of the English Workmen's Compensation Act:

"It is well, I think, in considering the cases, which are numerous, to keep steadily in mind that the question to be answered is always the question arising upon the very words of the statute. It is often useful in striving to test the facts of a particular case to express the test in various phrases. But such phrases are merely aids to solving the original question, and must not be allowed to dislodge the original words. Most of the erroneous arguments which are put before the Courts in this branch of the law will be found to depend on disregarding this salutary rule."

If I am right in the view that in common law cases the scope of authority rests on the agreement of employment entered into between the master and servant, the first thing to be done is to ascertain precisely the terms of the particular agreement under which Stinson was serving the railway on the date when the accident in question occurred.

The case of *Goh Choon Seng v. Lee Kim Soo*, [1925] A.C. 550, seems to me to be distinguishable in its facts from the present case, and I refer to it only for the purpose of quoting the observation of Lord Phillimore on p. 554:

"As regards all the cases which were brought to their Lordships' notice in the course of the argument this observation may be made. They fall under one of three heads—(1) The servant was using his master's time or his master's place or his master's horses, vehicles, machinery or tools for his own purposes; then the master is not responsible. Cases which fall

under this head are easy to discover upon analysis. There is more difficulty in separating cases under heads (2) and (3). Under head (2) are to be ranged the cases where the servant is employed only to do a particular work or a particular class of work, and he does something out of the scope of his employment. Again, the master is not responsible for any mischief which he may do to a third party. Under head (3) come cases like the present, where the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorized and would not have authorized, had he known of it. In these cases the master is, nevertheless, responsible."

I think that the present case falls under the second head noted above. Stinson had been in the service of the respondent railway for many years as a carpenter and general handy-man. Driving a motor was not part of his employment—whether he could or could not do so was immaterial. It was, of course, incidental to his work that he should get to the various places on respondent's line where that work was to be performed, and it was in contemplation of both the railway company and Stinson that transportation should customarily and normally be over the respondent's rails by means of facilities provided by the railway for that purpose; saving only the privilege of going by street car when necessary or desirable. That was the situation which continued for many years, but subsequently it was changed.

After the respondent railway had suffered losses in consequence of injuries to third parties occasioned by employees driving their own cars when engaged on railway business, the circular notices quoted in the foregoing statement of facts were issued and were brought directly to the attention of Stinson by his superior officer, McLeod, the bridge and building foreman of the respondent.

Some time later, Stinson, without placing insurance on his car, used it again in disobedience of the respondent's prohibition. This occurrence came to the notice of McLeod, and Stinson was summoned by McLeod and reprimanded. The details of that interview do not appear in the evidence. He was not dismissed but remained in respondent's employ. McLeod had not authority to discharge him. But if Stinson, at that interview

with his superior officer, had refused to be debarred from going to work in his uninsured motor, there could have been only one result, viz., his dismissal. There can be only one inference drawn from the continuance of his employment, viz., that the scope of his employment was thereafter, by his consent, definitely limited by excluding any right to travel to his work in his own motor so long as it remained uninsured.

When on the date of the accident in question he set out for his work by driving his uninsured car, he violated the terms of his implied agreement, disobeyed the prohibition of his employer, and was guilty of wilful misconduct for his own convenience and purpose. In my opinion, the act of setting out on his journey in his uninsured car placed Stinson outside the scope of his authority so that he was acting not as a servant of the railway, but as a stranger engaged on his own enterprise.

There appears to be little, if any, conflict in the principles of law applicable to the present appeal. The difficulty arises in the application of the law to the facts of the case, and the following cases serve merely as illustrations of the way in which different Courts have applied the law in varying circumstances, but they also afford suggestions regarding the proper application of the law in the present case.

In *Beard v. London General Omnibus Co.*, [1900] 2 Q.B. 530, the facts were that a plaintiff had been injured by the negligent driving of the conductor of an omnibus who, at the end of a journey, and in the absence of the regular driver, who had gone to his dinner, took charge of the omnibus and drove it around through some neighbouring by-streets, apparently with the intention of turning it around ready to start for the return journey. It was held that the onus was on the plaintiff to show that the injury was due to the negligence of a servant of the defendants *acting within the scope of his employment*, and that the conductor was a person who was authorized to do the act. The defendant company was held not liable for the negligence of the conductor, who, though in the service of the company as a conductor, was not acting within the scope of his employment when driving the omnibus. In the present case Stinson was employed as a carpenter, not as a driver of a motor.

In *Storey v. Ashton* (1869), L.R. 4 Q.B. 476, the facts were that a wine merchant carrying on business in 'V' Street, Min-

ories, sent his clerk in a cart to deliver wine at Blackheath, and it was the car man's duty to bring back empty bottles to 'V' Street, and then put up the horse and cart, but on the way back the clerk caused the car man to deliver him to his house in the City Road and asked him to go elsewhere, and when they had proceeded about two miles out of the way, the plaintiff was knocked down by the cart and seriously injured. The defendant was held not liable. In that case Cockburn, C.J., in the course of his judgment, says, "I think that a servant can only be said to be acting in the employment of his master when he is doing some act with his master's assent." This case was followed by the Supreme Court of Canada in *Halparin v. Bulling* (1914), 50 S.C.R. 471. In the present case the immediate cause of the accident was the driving of the motor by Stinson, which act was specifically prohibited, and was done not only without the master's assent, but in wilful disobedience of its prohibition.

In *Stevens v. Woodward* (1881), 6 Q.B.D. 318, the facts were that the plaintiffs occupied premises beneath the offices of the defendants who were solicitors. One of the defendants had a room of the offices, and in it was a lavatory for his own use exclusively, and his orders to his clerks were that no clerk should come into his room after he had left. A clerk went into the room to wash his hands at the lavatory after his employer had left, turned the water tap, and negligently left it so that water flowed from it into the plaintiffs' premises and damaged them. It was held that the act of the clerk was not within the scope of his authority, or incident to the ordinary duties of his employment, and that there was no evidence of negligence for which the defendants were liable. This case indicates that a prohibition by the master affords evidence from which, in certain circumstances, it may be found that the servant has acted outside the scope of his employment, and in my view that is the situation in the present appeal.

In *Rand v. Craig*, [1919] 1 Ch. 1, carters were employed by a contractor by the day to take rubbish from certain works to his dump and to tip it there, and were strictly forbidden to tip it anywhere else. Some of the carters, without the knowledge of the contractor, and in contravention of their orders, took the rubbish to a piece of unfenced land, the property of the plaintiffs, and tipped it there. They did this for their own convenience and for a purpose of their own. The unfenced land

was nearer to the works than the dump of the contractor. In an action by the plaintiffs against the contractor for an injunction it was held by the Court of Appeal, affirming the decision of Neville, J., that the illegal acts complained of were not within the sphere of the carters' employment, and consequently that the contractor was not liable for them. On page 9, the Master of the Rolls observes, "But in any case the acts of which they (the carters) were guilty were acts done deliberately of their own choice and to effect a purpose of their own and in opposition to the express instructions of their employer. The purpose of their own suggested was probably either to indulge their laziness or to give them an opportunity of spending an extra time in the public-house, but at any rate it was entirely a purpose of their own. The acts of which they were guilty were their own deliberate acts. It is not a case of carelessness or negligence in the course of their employment." These words seem to me to indicate considerations which are applicable to the facts of the present appeal.

In *Mazzola v. Turnbull & Jones Ltd.*, [1926] N.Z.L.R. 380, a servant of the defendant company engaged as an electrician at a distance from the defendant's place of business was provided by the defendant with railway fare to proceed to and from his work. Unknown to his employers he proceeded to his work in a car belonging to himself or in which he had a financial interest, and when on his way home negligently ran into and injured the plaintiff. The facts bear a striking similarity to the facts of the present case, and the result was a judgment for the defendant. The present case differs in that the respondent was not unaware of the servant's use of his motor, but such use was not winked at, and, on the contrary, was distinctly prohibited. The fact that a servant goes on a journey for a purpose of his master does not decisively determine that he is acting within the scope of his employment.

In the case of *Dowling v. Robinson*, [1909] 43 I.L.T. 210, Palles, L.C.B., says: "I think that where a servant goes on a journey for two purposes—for a purpose of his own and for a purpose of his employers—it becomes a question of fact to be decided upon all the circumstances of the case whether the journey is undertaken for the one purpose or for the other, and a jury may adopt either conclusion. I expressed the same opinion in *Cormack v. Digby*, I.R. 9 C.L. 557, where the Court

held that upon the facts of that case they could not as a matter of law hold the defendant liable for the act of his servant." In *Dowling v. Robinson* the defendant was found not to be liable.

In the case of *Boyd v. Smith* (1930), 66 O.L.R. 136, the servant Smith entered upon the journey during which the accident occurred, in the interest of his employer the Permanent Records Corporation Limited, but his journey in a motor wrongfully taken was outside the scope of his authority, and on that ground the Court of Appeal held that the master was not liable.

The cases of *Rand v. Craig*, [1919] 1 Ch. 1, and *Mazzola v. Turnbull and Jones Limited*, [1926] N.Z.L.R. 380 (the facts in each of which are set out above) illustrate the same view, and in each of them it was held that the master was not liable.

As to the propriety of the course pursued at the trial, what happened was as follows. The learned trial Judge submitted to the jury two questions only, (1) Did the accident result from the negligence of Stinson? and (2) the damages to be allowed if Stinson was liable. Without any objection either by the plaintiffs or by the defendants, he reserved to himself the disposition of the liability of the respondent railway for the act of its servant, treating it as a pure question of law.

I am of opinion that sections 54, 55(3), 59 and 60 of The Judicature Act, R.S.O. 1937, ch. 100, invest the trial Judge with jurisdiction to pursue the course here adopted whether the issue so reserved is a question of pure law or a question of mixed law and fact and that his discretion where so exercised will not lightly be interfered with by an Appellate Court.

I refer to the point because the appellants in their second ground of appeal, object that a question regarding "scope of employment" ought to have been submitted to the jury.

As already noted, no objection to the course pursued appears to have been taken at the trial, and this ground of appeal was not argued before us. The course pursued by the learned trial Judge in reserving to himself the question of respondents' liability was in my opinion a proper exercise of his discretion, though I incline to the view that the conclusion which he drew from undisputed evidence was an *inference of fact* resulting from the application of settled principles of law.

In so far as his conclusion may be regarded as a finding of fact that Stinson's journey in a prohibited motor for his own convenience was not incidental to the scope of his employment,

it stands in a position similar to the finding of a jury, if they had been asked the question "Was Stinson acting within the scope of his employment," and I discern no ground for interfering with that finding of fact by the trial Judge: *Sershall v. Toronto Transportation Co.*, [1939] S.C.R. 287.

For these reasons and for the reasons stated by the learned Chief Justice in the Court below, with which I fully concur, I am of opinion that this appeal must be dismissed with costs.

This conclusion renders it unnecessary to consider or deal with the other questions raised by the respondent, and in regard to them I express no opinion.

Since writing the foregoing, I have had the opportunity of perusing and considering the judgment of my brother Middleton which carries my entire concurrence.

FISHER J.A.: All the relevant facts have been stated with perfect precision in the learned and exhaustive reasons of Rose C.J.H.C. to be found in [1939] O.R. 517, from whose judgment dismissing the action against the Canadian Pacific Railway Company this appeal by the plaintiff is taken, and it is therefore necessary to repeat but few of the facts.

Shortly stated, Stinson was and had been for many years employed by the railway company as a handy-man, doing such work as painting, carpentry, repairing, etc., and his duties therefore extended only to acts done by his own hands and confined to the property of the railway company. In going from one place to another on the property of the railway company, he was provided by the company with certain designated modes of transportation. Certain circulars referred to in the reasons of the learned trial Judge appeared, and were brought to the attention of Stinson. These circulars were intended for, and applied to the great mass of the company's employees, including Stinson, who might have occasion and authority to use motor vehicles in the prosecution of their work. To all such employees, the circulars prohibited the use of an uninsured motor vehicle in the prosecution of their work. Stinson knew the conditions of the circular, but ignored them, and on the day the infant plaintiff was injured he frankly admitted that, without the consent or knowledge of anyone, and "for his own personal convenience" (see p. 298 of evidence), he used his uninsured motor vehicle to go to the North Toronto Station. He had a job there for the railway company in connection with a lock which he had in his pocket and was to fit it into the company's property.

On these facts, the question is, was Stinson, at the time he injured the infant plaintiff, acting within the course and scope of his employment? My answer to that question is that he was not. My reasons for so determining are: that as the essence of the relationship of master and servant implies control, and that, if control is by the act of the servant severed, the relationship of master and servant ceases. Stinson, by disobedience to his instructions, in operating his uninsured motor vehicle out in the street clearly placed himself during that period out of the control of his master. When out in the street, Stinson was out of control of his employers and could travel in any street and upon the wrong side of it if he chose, and also at a reckless rate of speed, and the master was helpless. There was no emergency in this case necessitating the use of this prohibited car in the street, and I am wholly unable to find it was an incident to Stinson's employment to use the prohibited car. The employer in this case had given no particular *directions* as to how or when Stinson was to do his act of carpentry, painting, repairing and other odd jobs (excepting of course the use of an uninsured motor vehicle), all of which he was free to perform as he pleased. If Stinson had injured someone when in the actual performance of his particular *duties* by doing his work in a manner the master had not authorized, the master would be liable; and it is here that the facts in the case at bar differ from the facts and the general law laid down in *Goh Choon Seng v. Lee Kim Soo*, [1925] A.C. 550. In that case it was decided that when a servant does an act which he is authorized by his employer to do under certain circumstances and under certain conditions, and he does it under circumstances or in a manner which are unauthorized and improper, in such cases the employer is liable for the wrongful act.

Operating this uninsured motor vehicle in the street was in truth the servant's own act, not the master's, and, clearly, on the facts, in my opinion was not only outside the course and scope of his employment but was an act that had the effect, as stated, of placing himself beyond the control of his master. I am unable to find any case deciding that a master is answerable for the tortious act of his servant, when he had no way of protecting himself, and at a time when the *servant had placed himself out of his control*. To so hold would be to impose an

appalling financial loss on the master at a time when he was helpless. If effect is to be given to the contention that Stinson could ignore the designated methods of transportation provided by his employer and was free to adopt any other method of travel that he pleased because, as contended, he was *then* acting in the course of his employment, it would follow that no limitations could be placed on Stinson's actions, and also that, if he chose to adopt a dangerous and prohibitory method of travel unknown to his employer, that was to be his concern and not that of his master. Such a contention means that, because Stinson was on his master's business, he could do his work in any manner he pleased. The words "acting in the course and within the scope of employment" must be given a common sense meaning and not construed as a license for an employee to put himself at large, out of control of his master, and free to ignore the terms of his employment. I repeat that, in my opinion, in such circumstances a servant cannot be considered as acting within the course and scope of his employment.

It was argued that Stinson, who was paid wages on an hour basis, by using his motor vehicle and shortening the time in going to the North Toronto Station, was acting in the interest of his employer, but in my opinion, in applying the test of the liability of the master for the tortious act of his servant, the Court is not to be concerned with the motive or intention of the servant, but whether the tortious act itself was committed within the scope of the servant's employment.

As the learned trial Judge has so fully referred to and discussed the law applicable to the facts in this case, no useful purpose is served by making any further reference, except I would add in furtherance of my conclusions the following cases: *Stevens v. Woodward* (1881), 6 Q.B.D. 318; *Rand v. Craig*, [1919] 1 Ch. 1; *Mazzola v. Turnbull & Jones Ltd.*, [1926] N.Z. L.R. 380; and *Roberts, Wallace & Graham on The Duty and Liability of Employers*, 4th Ed., at p. 85. I would add to the reasons given by the learned trial Judge freeing the railway from liability, the fact that Stinson had, for the reasons I have stated, severed the relation of master and servant and was outside the control of the master.

I would dismiss the appeal with costs.

GILLANDERS J.A.: I have had the privilege of reading the judgment of my brother Masten in this case, and as I have

reached the same conclusion, it is unnecessary to repeat much of what he has said and many of the numerous authorities which he cites.

The doctrine of respondeat superior, by reason of which it is argued that the respondent Railway Company is liable, has long been well established making a master liable for the act of his servant done within the scope or sphere of the servant's employment. It has been stated in various cases. In the very exhaustive and interesting judgment of Mr. Justice Isaacs in the case of *Bugge v. Brown* (1919), 26 C.L.R. 110, referred to by the Chief Justice in *The Municipality of The City of Port Coquitlam v. Wilson*, [1923] S.C.R. 235, at p. 247, he says, at p. 118:

"The limit of the rule—expressed in the widest form by the phrase the 'course of the employment' or 'the sphere of the employment'—is when the servant so acts as to be in effect a stranger in relation to his employer with respect to the act he has committed, so that the act is in law the unauthorized act of a 'stranger.'"

The difficulties arise, not from the principles to be applied, but in determining in the particular case under consideration the scope or sphere of the servant's employment as a matter of fact.

In the case at bar, the vital question is whether or not at the time of the accident it was within the scope or sphere of the employment of the defendant Stinson to be driving his uninsured private motor car for his employer, or whether or not in so driving he was in law outside the scope of his employment.

If one rules out for a moment the two notices posted up by the respondent company and brought to the attention of the employee, I fail to see how on the evidence it could be argued that Stinson had any authority express or implied to drive his private motor car on the business of his employer. Means of transport were provided by the company itself on its lines. If he wished to go by tram car, tickets were provided and he was not engaged as a motor car operator or driver.

Whatever may or may not have been done or practised by other employees of the railway company, otherwise engaged in connection with the company's business, there is no evidence that Stinson was using, or that it was necessary or incidental to his employment that he use, his private car on the business of the company. The driving of his motor car did not fall

within the class of act for which Stinson was employed. The notices in question prohibited the use of privately owned automobiles in the company's business unless insured, and the learned trial Judge finds, "There is no possibility of a finding that the company or any of Stinson's superiors in the company's service winked at the non-observance of the rule."

Stinson's superior had learned on one occasion when he, Stinson, had driven his private car, and for this he had been reprimanded and his attention drawn to the rule. It is argued that the notices themselves impliedly approved the driving of private cars, if insured by employees, on the company's business and, therefore, the act of driving a motor car came within the scope of Stinson's employment or was considered incidental thereto.

These notices must be related to Stinson's particular employment. The driving of a motor car did not, as I have stated, fall within the scope of that employment. His private car was uninsured. So far as he was concerned, the notice was an express prohibition and should not, I think, in relation to him be read as extending the scope or sphere of his employment to include the driving of his car on his employer's business.

The notices here, I think, are to be distinguished from those, e.g. in the case of *Limpus v. London General Omnibus Co.* (1862), 1 H. & C. 526. In that case the driver of the defendant's omnibus drove it across the road in front of a rival omnibus belonging to the plaintiff, causing damage thereto. The defendants had given written instructions to their driver relating to the rate at which and the manner in which the omnibus was to be driven and containing a prohibition against obstructing another omnibus. The trial Judge instructed the jury that, if the act of the defendants' driver, although reckless, was nevertheless an act done by him in the course of his service, that the instructions given to the defendants' driver were immaterial if he did not pursue them. This was upheld on appeal. It should be noted that in this case the servant was admittedly authorized to drive the omnibus; that was his job, and his instructions related to the manner of doing it.

In *Goh Choon Seng v. Lee Kim Soo*, [1925] A.C. 550, the servant was, in lighting fires and burning rubbish, doing what he was authorized to do, and it was immaterial to the master's liability that it was done on Crown lands, adjacent to those of

the defendant, and at an unauthorized time. The act of setting a fire and burning was the cause of the damage and that act was what the servant was employed to do.

While, as has been said by Mr. Justice Masten, the numerous cases arising under the Workmen's Compensation Act in England should be applied with great caution and are in some aspects inapplicable here, to my mind the discussion in many as to the scope of the servant's employment, is useful.

In *Barnes v. Nunnery Colliery Company, Ltd.*, [1912] A.C. 44, where a boy employed at a colliery noticing that an endless rope having a number of empty tubs attached to it was about to start for a level where his work was, jumped into the front tub with three other boys in order to ride to his work instead of walking, as he ought to have done, and received injuries from which he died. It was a common practice for boys to ride in the tubs, but it was expressly forbidden, and the prohibition was enforced as far as possible. At page 49, Lord Atkinson says in part:

"In these cases under the Workmen's Compensation Act a distinction must, I think, always be drawn between the doing of a thing recklessly or negligently which the workman is employed to do, and the doing of a thing altogether outside and unconnected with his employment. A peril which arises from the negligent or reckless manner in which an employee does the work he is employed to do may well be held in most cases rightly to be a risk incidental to his employment. Not so in every case. For example, if a master employs a servant to carry his (the master's) letters on foot across the fields on a beaten path, or on foot by road to a neighbouring post office, and the servant having got the letters, went to the stables, mounted his master's horse, and proceeded to ride across country to the post office, was thrown and killed, or went to his master's garage, took out his motor car, and proceeded to drive by road to the post office, came into collision with something, and was killed, it could not be held, I think, according to reason or law, that the injury to the servant arose out of his employment, though, in one sense, he was about to do ultimately the thing he was employed to do, namely, to bring his master's letters to the post. In such a case this servant puts himself into a place he was not employed to be in, and had no right to be in—the back of his master's horse, or the seat of his master's motor car. He was doing a thing he was not employed to do, and had no right to

attempt to do, namely, to ride his master's horse across country, or to drive his motor car. These were altogether outside the scope of his employment."

Keeping in mind that this is a compensation case and that here we are dealing with the claim of an injured third party, it seems to me that the same reasoning is to a large extent applicable as to the scope of the servant's employment.

So in *Plumb v. Cobden Flour Mills Co. Ltd.*, [1914] A.C. 62, which was also a case arising under the Compensation Act where a workman was injured by pulling a rope over a revolving shaft to haul up bundles of sacks, the County Court Judge was of opinion that the method of hoisting the sacks adopted by the appellant, though unwise, was adopted for the purpose of carrying out more expeditiously the work entrusted to him by his employers and was not for his own pleasure or convenience, and found the accident arose out of the course of his employment. The Court of Appeal reversed this decision and, at page 66, Lord Dunedin says in part referring to the expression "scope" or "sphere of employment":

"The expression was used in an early case, the case of *Whitehead v. Reader*, [1901] 2 K.B. 48, by Collins L.J., who pointed out that the question of whether a servant had violated an order was not conclusive of whether an accident so caused did or did not arise out of the employment and put as the test. Did the order which was disobeyed limit the sphere of the employment, or was it merely a direction not to do certain things, or to do them in a certain way within the sphere of the employment?"

And later, referring to the argument of counsel, he continues:

"The fallacy of this consists in not adverting to the fact that there are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere."

In *Bugge v. Brown* (*supra*), and in other cases, the view is expressed that the precise terms of the authority is not the criterion of liability, but that the function, the operation, the

class of act to be done by the employee, is the criterion. Isaacs J., at page 118 says:

“(8) The act of the servant complained of is regarded as outside the relation, and as that of a stranger: (a) if he did not assume to act within the scope of his employment (*Hutchins v. London County Council*, 85 L.J.Q.B. 1177; *Limpus* case (*supra*); or (b) if what he did was a thing so remote from his duty as to be altogether outside of, and unconnected with his employment (*Barnes v. Nunnery Colliery Co.* (*supra*); *Black v. Christchurch Finance Co.*, [1894] A.C. 48).

“(9) A prohibition, either as to manner, or as to time, or place, or even as to the very act itself, will not necessarily limit the sphere of employment so as to exclude the act complained of, if the prohibition is violated.

“(10) An instruction or a prohibition may, of course, limit the sphere of employment. But to have that effect it must be such that its violation makes the servant's conduct complained of so distinctly remote and disconnected from his employment as to put him *qua* that conduct virtually in the position of a stranger. (*Plumb's* case (*supra*); *Barnes' case* (*supra*)). This is the ultimately decisive consideration in this case.”

In the case at bar Stinson was employed as a carpenter and handy-man. It is clear that it was incidental to his duties at times to go from place to place on the company's lines. For this purpose adequate provision had been made by the company and, whatever might be said respecting the scope of the employment of persons with other duties and other jobs, I think that there was no authority express or implied for Stinson to drive his uninsured private car on the company's business. In addition there was a definite prohibition, which in his case did not, I think, relate to the manner of doing something which was otherwise within the scope of his employment, but which was against the doing of the very act itself which was the *causa causans* of the accident here in question. He states that his purpose in using his car was for his own convenience, and although he had the key which he proposed to fit in his pocket at the time and it was incidental that he go from West Toronto to North Toronto to do his work, I think when he got into his own motor car under the circumstances here disclosed, in so doing he was not within the scope of his employment and that *qua* that conduct he was virtually in the position of a stranger to his employment.

Two further points are raised, with one of which I should possibly deal.

In the statement of claim the adult plaintiff claimed \$1,000 and on behalf of the infant plaintiff \$5,000. The jury assessed the damages of the infant plaintiff at \$10,000 and, after verdict and before judgment, plaintiffs' counsel moved to amend the statement of claim, and an order was made permitting the amendment asked. It is urged by the respondent railway company that such amendment should not have been made; that rule 145 requires the plaintiff to name the amount of damages claimed; that the practice here differs from that in England in that the English rules do not require the amount claimed to be stated, and that giving proper effect to this rule the plaintiffs should not have been permitted to amend so as to effect such a radical change in the amount claimed.

A number of cases were cited, but none reported either in England or here where an amendment under similar circumstances was refused.

The question of amending pleadings after trial and before judgment was fully considered by Mr. Justice McTague in *McLellan v. Milne et al.*, [1937] O.R. 742, at pages 750 and following (although the amendment asked in that case was to plead the Limitations Act). He quotes from *Williams v. Leonard* (1895), 16 P.R. 544, affirmed (1896), 17 P.R. 73, and by the Supreme Court of Canada in (1896), 26 S.C.R. 406, following the rule laid down in *Steward v. North Metropolitan Tramways Co.* (1886), 16 Q.B.D. 556, per Lord Justice Lindley, at p. 559:

"I think an amendment ought always to be allowed, except when the other party cannot be placed in the same position, but an injury would be occasioned to him by the amendment which could not be compensated by costs."

In this case the defendant railway company had the injured boy examined by an eminent doctor who heard the evidence at the trial and gave his testimony. There was no surprise, except possibly in the amount at which the jury assessed the damages, and no injustice was, I think, done in the granting of the amendment. Under the circumstances of this particular case it was properly made.

It was also urged by the respondent company that because the plaintiff has taken judgment against the defendant Stinson, and has since judgment and prior to the hearing of the appeal,

issued an attaching order and obtained in several small payments a total of some \$25, he has thereby elected and cannot now proceed further against the other defendant. In view of the conclusion at which I have arrived, it is not necessary that I deal with this point.

I am of opinion the appeal must be dismissed with costs.

MCTAGUE J.A. (dissenting): Appeal by the plaintiffs from the judgment of Rose C.J.H.C. dated the 11th July, 1939, and reported in [1939] O.R. 517. The action was for damages sustained by the infant plaintiff when struck by a motor car owned and driven by the defendant Stinson as well as for expenses incurred by the adult plaintiff, father of the infant, as a result of the accident. The jury found that the injuries were caused by Stinson's negligence, and the Chief Justice directed judgment to be entered against Stinson, but, after reserving judgment on the question as to whether the Canadian Pacific Railway Company as Stinson's employer was liable, decided in favour of the Railway Company and as against it dismissed the plaintiffs' action. From this the plaintiffs appeal.

As the learned Chief Justice has found, Stinson had been in the service of the Railway Company for many years as a general handy repair man. At the Company's works in West Toronto Stinson had made a key for use in a lock in the Company's station at North Toronto and was authorized by his foreman to go to North Toronto and try it in the lock. It was while in the course of carrying out the foreman's instructions that the accident took place. Stinson, as the means of transportation, used his own motor car, and while so using it the infant plaintiff was injured as the jury found by Stinson's negligent driving.

This simple state of facts is somewhat complicated by virtue of certain notices dated December 8th, 1937, and December 28th, 1937, posted by the Railway Company and brought directly to Stinson's attention long before the date of the accident. Since the notices have been quoted verbatim by the Chief Justice, I refrain from further referring to them except as to what I think is the proper interpretation to be put upon them. The proper construction I think is that the Company was aware that a practice had grown up of employees using their own motor cars in the Company's business. The company did not seek to prohibit the practice, but attempted by notice to limit

it to the use of insured motor cars. The evidence I think quite definitely establishes that Stinson is to be taken as belonging to the class of employees who could use their motor cars on the company's business providing the cars were insured. The foreman, McLeod, makes that quite clear in his evidence at page 155, lines 19 to 21, and at page 163, lines 18 to 20. It appears that the foreman's attention had been drawn to the fact that Stinson on one occasion at least after the posting of the notices had used his own car even though it was not insured. The foreman did not take the position that Stinson was a person who could not use his motor car in the Company's business under any circumstances. What he did tell Stinson was "that he must not use his car unless it was covered by insurance." As I conceive the law to be, the notices themselves are immaterial to the real question here, and in this case cannot delimit or exclude liability which eventually must rest on the proper application of the doctrine *respondeat superior*. See *Limpus v. London General Omnibus Co.* (1862), 1 H. & C. 526.

Qui facit per alium facit per se is the foundation upon which a most confusing jurisprudence has been built. The principle on which the responsibility rests is that it is more just to make the person who has entrusted his servant with the power of acting in his business responsible for injury occasioned to another in the course of so acting than that the other and entirely innocent party should bear the loss. The act complained of must be done in the course of the master's business. As the learned Chief Justice has aptly put it in the judgment appealed from, "a master is not responsible for the negligent act of his servant simply because it was committed *at a time* when the servant is engaged in his master's business. The act must be committed *in the course* of that business." As the Chief Justice says, that is a matter very difficult to determine. Speaking for myself, I wish it had been left to the jury in this case. The expression "course of employment" may be wider than the actual authority itself. See *Dyer v. Munday*, [1895] 1 Q.B. 742; *Lloyd v. Grace, Smith & Company*, [1912] A.C. 716, at pp. 732-737. The master's responsibility may still remain even if he proves he has actually forbidden the act; *Limpus v. London General Omnibus Company* (*supra*), Mr. Justice Isaacs in an interesting case in Australia, *Bugge v. Brown* (1919), 26 C.L.R. 110, at p. 118, rather neatly adopts the language of Collins M.R. in *Cheshire v. Bailey*, [1905] 1 K.B. 237, and Lord Shand in *Black v. Christchurch Finance Co.*,

[1894] A.C. 48, at p. 55, and puts the test this way: "The limit of the Rule—expressed in the widest form by the phrase 'the course of employment'—is when the servant so acts as to be in effect a stranger in relation to his employer with respect to the act he has committed, so that the act is in law the act of a stranger." This to my mind is the proper working principle to apply in ascertaining liability pursuant to the doctrine on a given state of facts. While *Bugge v. Brown* is an Australian case, it was referred to, as I take it, with approval by the present Chief Justice of Canada in *The Municipality of The City of Port Coquitlam v. Wilson et al.*, [1923] S.C.R. 235. The principle as enunciated by Mr. Justice Isaacs is in accord with the *Limpus* case where the summing up of Martin B. to the jury, while not in the same words, was to the same effect and was approved by the Court of Appeal. It also seems to be in accord with *Goh Choon Seng v. Lee Kim Soo*, [1925] A.C. 550, where the Judicial Committee held that an employer is responsible for damage caused by the negligent act of his servant in carrying out work which he is employed to do even if the act incidentally involves a trespass which the employer has not authorized.

In applying the principle to the present case, it seems perfectly clear that in transporting the key from West Toronto to North Toronto Stinson was about his master's business. Did he, because of the mode of transportation which he used, divest himself of the character of servant and become a stranger to his employer? I do not think so. If in the course of his trip he had gone off on a venture of his own and injured someone, it might well be said that in doing that he had lost his character of servant. On the occasion in question here he was not using a means of transportation which in itself was prohibited. He was merely disobeying an injunction of his employer that he should insure his car and thus, at his own expense, provide practical indemnity to his employer for liability to third persons. Disobedience by the servant may be a cause for dismissal by the master, but in *se* is not a defence to liability of the master to third persons under the doctrine of *respondeat superior*.

I am quite aware that, in applying the doctrine as I do, many decisions may be quoted against me. It is a question of fact in each case, and the texts are full of apparently conflicting decisions, although a very large number of them are jury verdicts.

I think in each case it is a question of applying the proper principle to the particular state of facts. Cases "on all fours"

are most difficult to find. An old one, fairly closely allied to the case at bar, though perhaps somewhat distinguishable, is *Patten v. Rea* (1857), 2 C.B. 605. Much of the difficulty that has arisen results from the use of principles applicable to principal and agent and independent contractor cases. Much has also arisen from compensation cases which deal in large measure with categorical statutory definitions of such terms as "course of employment", "sphere of employment," etc. I have deemed it the safer course to limit consideration to common law cases, and particularly to decisions of the House of Lords, the Privy Council, the Supreme Court of Canada and the English Court of Appeal. The result I have reached follows from a selective process and may well be in error. At any rate, subject to what may be said on other points raised by the respondent, I think judgment should be entered against the Railway Company.

At the opening of argument on the appeal, it appeared that the plaintiffs had taken judgment against Stinson and in addition attachment proceedings garnisheeing his wages. Mr. Tilley took the position that they must be taken to have elected and were therefore precluded from proceeding further against the Railway Company. I do not think effect can be given to this contention. This is not a type of action in which the plaintiff is bound to elect. Vicarious liability is not substituted liability. The matter is dealt with by Rowell C.J.O., in *Kerr v. T. G. Bright & Co. Ltd. et al.*, [1937] O.R. 205, but on the principle of joint tortfeasance which I do not think applies. As pointed out by Duff C.J.C. in the same case "*respondeat superior* is a rule which does not rest upon any notion of imputed guilt or fault." It arises out of a principle which I have already referred to, first laid down so far as I can find about 1700 by Holt C.J., in *Hern v. Nichols*, 1 Salk. 289. The liability, if any, arises from the relationship and no question of election arises. The master cannot be liable in law unless the servant is liable. The Railway Company was sued along with Stinson, and I think nothing precludes the plaintiffs from realizing on the judgment against Stinson while the liability of the Railway Company is still in appeal. It might be different in a case on contract against principal and agent.

Mr. Tilley also presses that the amount of the verdict is excessive and should be reduced. There was evidence I think on which the jury could bring in such a verdict, though the

element of speculation as to the future enters into the estimate of damages. It is evidence of such a character that there is bound to be some speculation on the jury's part, but the jury once having done the speculating, the process cannot be continued by an appellate court. See *Warren v. Gray Goose Stage Limited*, [1938] S.C.R. 52.

In the statement of claim the amount of the damages asked on behalf of the infant plaintiff was \$5,000. The amount of the damages found by the jury was \$10,000. No amendment was applied for till after the jury had returned its verdict. The Chief Justice then allowed the statement of claim to be amended so as to conform to the jury's verdict. The respondent now asks that that order be set aside. It must be remembered that there is no English rule like our Rule 145 which requires the plaintiff to state the amount of damages claimed in a statement of claim, and English cases are of little help here. I must confess I have much sympathy for the contention of the respondent. The case which was before this jury on the pleadings was whether the infant plaintiff was entitled to \$5,000 or less, or nothing at all. While in *White v. Proctor et al.*, [1937] O.R. 647, an appellate court appears to have held that where a jury awards damages in excess of the amount claimed, amendment should follow as a matter of course, I can hardly concede that to be the correct principle. If it were so in jury cases, then Rule 145 might as well not exist. One would be conceding that it is really the jury which is amending and not the court at all. Rather, I think it is in each case a matter of discretion for the trial Judge. On the general principle that amendments should not be allowed, except where the other side can be compensated in costs, I should think the circumstances must be very unusual before amendments of this kind should be allowed. In this particular case, while I note that the learned Chief Justice seemed to be somewhat surprised at the amount of damages awarded the adult plaintiff, I am unable to say that he did not think that the amendment permitted was just and equitable in the case of the infant plaintiff. There is nothing in the evidence which I think warrants setting aside the order.

I would allow the appeal with costs and direct that judgment should be entered in the court below against the Railway Company for the amount of damages found by the jury, and costs.

Appeal dismissed with costs, MCTAGUE J.A. dissenting.

[COURT OF APPEAL.]

Re Carey.

The Dependants' Relief Act, R.S.O. 1937, ch. 214—Application by widow under Act—Separation agreement—Whether widow was at time of husband's death living apart from him "under circumstances which would disentitle her to alimony" within meaning of sec. 9 of the Act—Reasons for the separation agreement considered.

By sec. 9 of The Dependants' Relief Act, R.S.O. 1937, ch. 214, it is provided that "no order shall be made under this Act in favour of a wife who was living apart from her husband at the time of his death under circumstances which would disentitle her to alimony."

Held, that a wife who had entered into a separation agreement with her husband and was living apart from him at the date of his death is not thereby deprived of any right she may have to an order under the Act if the circumstances under which she was living apart from her husband were such that she was entitled to alimony and had a right to recover it if at any time her husband had ceased to pay her the sums agreed upon for her maintenance.

Wood v. Wood (1887), 57 L.J. Ch. 1, applied.

AN appeal by the mother of the deceased from an order of His Honour Judge Killoran, of the Surrogate Court of the County of Perth, made under the provisions of The Dependants' Relief Act, R.S.O. 1937, ch. 214.

January 8th and 9th, 1940. The appeal was heard by ROBERTSON C.J.O., MIDDLETON and GILLANDERS JJ.A.

E. G. Thompson, for the mother of the deceased, appellant, submitted that the learned Surrogate Judge was in error in holding that the respondent, the widow of the deceased, was entitled to relief under The Dependants' Relief Act, R.S.O. 1937, ch. 214. The testator died on the 10th day of July, 1938, but the application for relief under the Act was not made until November 10, 1938, *i.e.*, more than the three months allowed by sec. 4(2) of the Act. It is true that the Judge on October 4th gave the respondent leave to launch the application sometime in the future after the expiration of three months from the testator's death but sec. 4(2) does not authorize such a type of special future leave.

The respondent's application was not made upon originating notice according to the practice of the Court as is required by sec. 4(1) of the Act nor was leave obtained to serve short notice of motion. The notice itself was served after four p.m. contrary to the Rules. By the time of the hearing of the application the estate had been "distributed". The debts had been paid and the assets transferred to the executrix in her own right.

The respondent was living apart from her husband at the time of his death pursuant to a separation agreement. The very existence of this agreement would have precluded the wife from obtaining a judgment for alimony. Thus the respondent was living apart from her husband at the time of his death under such circumstances as would disentitle her to alimony. Hence no order can be made under sec. 9 of the Act in her favour. Reference to *Drewry v. Drewry* (1916), 30 D.L.R. 581 (P.C.); *Atwood v. Atwood* (1893), 15 P.R. 425, 16 P.R. 50.

The learned Judge in violation of sec. 7 of the Act ignored the sums which the testator had paid over *inter vivos* to the respondent under the separation agreement. In view of these payments it is now inequitable to interfere with the will.

The learned Judge improperly admitted evidence as to the physical condition of the respondent and her deceased husband and it is submitted his judgment was influenced thereby: Reference to *Re McCaffery*, [1931] O.R. 512.

J. L. Murray, for the widow, respondent, contended that the application was made within the three months allowed by the Act.

"Distribution" means division among several persons hence this estate was not "distributed" when the property passed from the executrix in her representative capacity to herself in her personal capacity, and therefore the application is not barred by "distribution" as contemplated by sec. 4(2) of the Act. Reference to Wharton's Law Lexicon, and Halsbury, 1st ed., vol. II, p. 2.

Any objections to the sufficiency of the notice of motion or service thereof have been waived by the appellant, she having appeared three times previously without having taken objection.

Counsel submitted that where the husband and wife are living apart pursuant to a separation agreement, the wife cannot be said to be living apart from her husband under circumstances such as would disentitle her to alimony, such as desertion or unchastity. Reference to *Re Tolhurst* (1906), 12 O.L.R. 45; *Re Davidson* (1929), 65 O.L.R. 20.

The Act is framed in the public interest; hence a dependant cannot validly contract with the testator to forego rights under the Act. Thus the separation agreement cannot operate as a waiver or a release even though it contains a releasing clause

and a covenant for future assurances. Reference to *Re Anderson Estate*, [1934] 1 W.W.R. 430; *Hyman v. Hyman*, [1929] A.C. 601; *Re Gardiner v. Boag*, [1923] N.Z.L.R. 739; *Re Parish v. Parish*, [1924] N.Z.L.R. 307.

The learned Judge properly ignored the payments made under the separation agreement because they were barely sufficient to maintain the respondent, much less build up any reserve.

Far from being excessive the amount claimed at first instance by the wife was inadequate. The testator left no other dependants. His mother who is the sole beneficiary of his will is not dependant. Reference to *Bosch v. Perpetual Trust Co. Ltd.*, [1938] 2 All Eng. R. 14; the Act, sec. 1(b).

The respondent's health has been ruined by being repeatedly infected with a social disease by the testator. Before her marriage her health was good. She has no business training and has several unpaid bills. Her only asset is a gratuity from the Bell Telephone Co. Under all the circumstances she is entitled to the maximum allowed by the Act, *i.e.*, that passing to her under an intestacy.

Cur. adv. vult.

January 19th, 1940. The judgment of the Court was delivered by ROBERTSON C.J.O.:—This is an appeal from the order of Judge Killoran, Judge of the Surrogate Court of the County of Perth, made under The Dependants' Relief Act on 1st November, 1939. The order directs the payment of an allowance to respondent, the widow of the testator who died in July, 1938. The appeal is by the executrix, who is the mother of the testator and the sole beneficiary under his will.

Several grounds of appeal were relied upon, and all but one were disposed of upon the argument adversely to the appellant. The remaining ground is based upon sec. 9 of The Dependants' Relief Act, which is as follows:

"9. No order shall be made under this Act in favour of a wife who was living apart from her husband at the time of his death under circumstances which would disentitle her to alimony."

Respondent was living apart from her husband at the time of his death and appellant sets up a separation agreement between the testator and respondent made on 7th May, 1931. By this agreement the husband and wife agreed to live separate and apart; the husband agreed to pay his wife \$55.00 per month dur-

ing the separation and so long as she should remain his wife, and provision was made for a division of the household furniture between them and for the payment of some accounts then outstanding. The following provisions were particularly relied upon:

"3. And in further consideration of the premises, the said wife covenants with the said husband that she will at all times hereinafter during the continuance of the said separation, maintain and support herself and indemnify and save harmless the said husband from and against all liabilities hereafter contracted and demands on account thereof and all costs, charges, damages and expenses to which the said husband may be put by reason of or on account thereof. And the said wife will not molest, disturb or trouble the said husband or interfere with him in any way or manner whatsoever."

"12. Subject to the foregoing provisions the said parties hereby agree each with the other of them and on behalf of the said respective heirs, executors and administrators of each of them that each party hereto his or her respective heirs, executors or administrators shall be released from all manner of actions, causes of action, debts, accounts, covenants, contracts, claims and demands whatsoever which each has or had or may hereafter have against the other his or her heirs, executors and administrators by reason of any cause, matter or thing existing whatsoever up to the present time."

It is not disputed that the terms of this agreement were observed by both parties to it so long as the husband lived, and it has been determined in a proceeding for the construction of the agreement since the husband's death, that liability to make the monthly payments provided for in the agreement then ceased.

Appellant's contention is that in these circumstances sec. 9 directly applies and prevents the making of any order in respondent's favour.

There is evidence of the circumstances that brought about the separation and of its necessity, but appellant objects to the relevancy of this evidence and argues that the separation agreement alone is admissible.

The conduct and relations of a testator and any of his dependants in his lifetime, as pointed out in *Re McCaffery*, [1931] O.R. 512, are not usually proper matters for consideration on an

application under the Act, but when sec. 9 is invoked the circumstances under which the wife lived apart are made an essential part of the case, and while no doubt the husband and wife live apart under a separation agreement when there is such an agreement, that is not the only circumstance necessary to be considered to determine whether the wife is disentitled to alimony.

The marriage took place on 2nd January, 1926, and respondent was then a normal healthy young woman of 23 years. Immediately upon her marriage she was infected with venereal disease and for this her husband was undoubtedly responsible. From that time she was never for long free from the infection. Prolonged medical treatment by a doctor chosen by her husband was ineffective, and in 1928 a surgical operation became necessary. Respondent had been home from that operation but a short time when she was again infected, and there was another operation in the Spring of 1929. Within that year a third operation was necessary. Severe hemorrhages followed one or more of these operations, and respondent's general health became gravely impaired. In 1930 she was found to be suffering from tuberculosis in a somewhat advanced stage and she was ordered to bed, where she spent the next three years. According to the medical testimony, although the advance of tuberculosis has been stayed, she is now and will always be a semi-invalid with marked physical limitation. It was after she had been for six months confined to bed with tuberculosis that the separation agreement was made. It had no doubt then become obvious that respondent must thenceforward live apart from her husband, if she was to live at all.

Appellant's counsel says that it does not matter what brought about the separation; that here is an agreement that would have been a complete answer to an action for alimony and that the wife, therefore, became disentitled to alimony by making the agreement.

While the separation agreement does not mention alimony, I think it may be taken that so long as the husband observed the terms of the agreement and made the monthly payments for maintenance required by it, the wife could not successfully have sued for alimony. That is not enough, however. Appellant must show that the wife had become disentitled to alimony. The matter may be tested by enquiring what rights the wife would

have had in case the husband had made default in the monthly payments. There is authority that in such case the wife might sue for alimony, as such, and obtain an order for payment of interim alimony, according to the practice peculiar to alimony actions. In *Wood v. Wood* (1887), 57 L.J. Ch. 1, an order for interim alimony was made in just such a case, the wife not being compelled to resort to an action on the separation agreement. The reason for this seems plain. The periodical payments for maintenance are in truth the payment of alimony, although not so called. The judgments in the case of *Wood v. Wood* on appeal were given by Lindley L.J. and Lopes L.J. and it is significant to note that in the course of their reference to the cases of *Powell v. Powell* (1874), L.R. 3 P. & D. 186 and *Gandy v. Gandy* (1882), 7 P.D. 168, and to the payments for maintenance made under separation deeds in those cases, they both speak of them as payments of "alimony". This use of the word "alimony" is quite within its proper meaning although among lawyers it is more usually applied to an allowance made to a wife by order of Court.

When one considers the circumstances of this case—the necessity for the wife to live apart and the cause of it—the wife's need of maintenance and the husband's knowledge of these things—it did not require that the payments should be made under the order of a Court to constitute them payments of "alimony". The husband chose to make the payments without a lawsuit, but that circumstance does not affect their essential character.

Appellant cited *Atwood v. Atwood* (1893), 15 P.R. 425, 16 P.R. 50. In that case there had been a separation agreement under which the wife agreed to accept certain payments in consideration of which she agreed that she would not sue for alimony. When all the payments had been completed, she promptly sued for alimony and applied for interim alimony, and it was refused. On appeal the Court was equally divided. The case has little resemblance to the present case and established, if anything, no more than a point of practice.

Reference was also made to cases decided under what is now sec. 13, subsec. 1(a) of The Dower Act (R.S.O. 1937, ch. 112). This provides for the making of an order dispensing with the wife's concurrence in a sale or mortgage when she has been living apart from her husband for two years under such circum-

stances as disentitle her to alimony. These cases are not useful, for until 1909 the words "by law" appeared immediately before the word "disentitle" in the statute, and it was held in *Re Tolhurst* (1906), 12 O.L.R. 45, that these words had the effect of confining this provision to cases where the wife was disentitled by law, independently of any separation agreement. The only case cited upon The Dower Act that arose after the words "by law" were stricken out by 9 Ed. VII, ch. 39, sec. 14, is *Re Davidson* (1929), 65 O.L.R. 19. That decision does not assist appellant and is really of no application here.

In my opinion it is impossible, having regard to the terms of sec. 9 of The Dependants' Relief Act, to apply them to the respondent. She was not in any proper sense of the word "disentitled" to alimony. On the contrary the circumstances under which she was living apart from her husband were such that she was entitled to alimony and had a right to recover it if at any time her husband had ceased to pay her the sums agreed upon for her maintenance.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

[COURT OF APPEAL.]

Rex v. Stewart.

Criminal Law—Offence against sec. 39(a) of the Regulations made under The War Measures Act, R.S.C. 1927, ch. 206—Publication of newspaper containing statements likely to cause disaffection to His Majesty, likely to prejudice recruiting and likely to be prejudicial to the efficient prosecution of the war—Whether mens rea on part of accused essential to a conviction—Indictment—Whether indictment defective because in each count several offences charged in alternative—Sentence.

By Regulation 39(a) of the Regulations made by the Governor-General in Council under the authority contained in sec. 3 of The War Measures Act, R.S.C. 1927, ch. 206, it is provided as follows:

“39a. No person shall print, circulate or distribute any book, newspaper, periodical, pamphlet, picture, paper, circular, card, letter, writing, print, publication or document of any kind containing any material, report or statement, false or otherwise, (a) intended or likely to cause disaffection to His Majesty or to interfere with the success of His Majesty's Forces or of the forces of any allied or associated Power, or to prejudice His Majesty's relations with foreign Powers, or (b) intended or likely to prejudice the recruiting, training, discipline or administration of any of His Majesty's Forces, or (c) which would or might be prejudicial to the safety of the state or the efficient prosecution of the war.”

The appellant and others were charged in that they did unlawfully print, circulate or distribute a newspaper known as The Clarion containing statements intended or likely to cause disaffection to His Majesty and intended or likely to prejudice the recruiting of any of His Majesty's Forces and which might be prejudicial to the efficient prosecution of the present war, contrary to the said regulation 39(a).

The appellant was the business manager of The Clarion, in charge of advertising and circulation, and asserted at the trial that he had no knowledge that the offending article was in The Clarion until after the particular issue containing the article was published.

The trial Judge instructed the jury that to constitute an offence under Regulation 39(a) it was not necessary for the Crown to establish that the appellant had knowledge that the article was contained in the paper or that he intended to circulate or distribute a newspaper containing an article of the forbidden character. The jury found the appellant guilty and he appealed from his conviction to the Court of Appeal, contending that the trial Judge had wrongly instructed the jury and ought to have instructed them that *mens rea* was a necessary element of the offences charged.

Held, having regard to the terms in which Regulation 39(a) is expressed, and having regard to the fact that Regulations were passed in the interest of the public safety, it is not a defence in a prosecution for their breach to say that what was done was done in ignorance or without intending any harm. The learned trial Judge instructed the jury correctly and the appeal should be dismissed.

AN appeal by the accused from conviction and sentence.

February 5th and 6th, 1940. The appeal was heard by ROBERTSON C.J.O., MASTEN and HENDERSON J.J.A.

R. L. Kellock, K.C., and J. Newman, for the accused, appellant.

C. R. Magone, K.C., for the Crown, respondent.

February 26th, 1940. The judgment of the Court was delivered by ROBERTSON C.J.O.:—This is an appeal from the conviction of the appellant, Douglas Stewart, on 17th January, 1940, on his trial before His Honour Judge Macdonell and a jury in the General Sessions of the Peace for the County of York, for offences against sec. 39(a) of the Regulations made under The War Measures Act, being R.S.C. 1927, ch. 206. The appellant was found guilty on three counts and was sentenced to imprisonment for two years in the Kingston penitentiary.

Certain other persons were named in the indictment with the appellant but he was tried alone. The counts in the indictment on which appellant was tried are as follows:

“The jurors for our Lord the King present that Douglas Stewart, Samuel Scarlett, Joseph Cline, alias Klinestein, and Thomas C. Sims during the month of November, 1939, at the City of Toronto, in the County of York, unlawfully did print, circulate or distribute a newspaper or periodical known as ‘The Clarion’ dated Saturday, November 11th, 1939, containing reports or statements intended or likely to cause disaffection to His Majesty contrary to sec. 39(a) of the Defence of Canada Regulations.

“The jurors for our Lord the King further present that Douglas Stewart, Samuel Scarlett, Joseph Cline, alias Klinestein, and Thomas C. Sims during the month of November, 1939, at the City of Toronto, in the County of York, unlawfully did print, circulate or distribute a newspaper or periodical known as ‘The Clarion’, dated Saturday, November 11th, 1939, containing reports or statements intended or likely to prejudice the recruiting of any of His Majesty’s Forces contrary to sec. 39(a) of the Defence of Canada Regulations.

“The jurors for our Lord the King further present that Douglas Stewart, Samuel Scarlett, Joseph Cline, alias Klinestein, and Thomas C. Sims during the month of November, 1939, at the City of Toronto, in the County of York, unlawfully did print, circulate or distribute a newspaper or periodical known as ‘The Clarion’, dated Saturday, November 11th, 1939, containing reports or statements which might be prejudicial to the efficient prosecution of the present war contrary to sec. 39(a) of the Defence of Canada Regulations.”

The Regulations referred to were made by the Governor-General in Council under the authority of sec. 3 of The War

Measures Act, in the emergency of apprehended war, immediately after the declaration of war by the United Kingdom against Germany on 3rd September, 1940. Regulation 39(a) is as follows:

"39a. No person shall print, circulate or distribute any book, newspaper, periodical, pamphlet, picture, paper, circular, card, letter, writing, print, publication or document of any kind containing any material, report or statement, false or otherwise,

"(a) intended or likely to cause disaffection to His Majesty or to interfere with the success of His Majesty's Forces or of the forces of any allied or associated Power, or to prejudice His Majesty's relations with foreign Powers, or

"(b) intended or likely to prejudice the recruiting, training, discipline or administration of any of His Majesty's Forces, or

"(c) which would or might be prejudicial to the safety of the state or the efficient prosecution of the war."

"The Clarion" was a weekly publication printed at Toronto. It had a circulation of about eight thousand to ten thousand throughout Canada. The matter published in the issue of November 11th, 1939, which forms the basis of the present charges is headed, "Manifesto of the Executive Committee of the Communist International issued on Twenty-second Anniversary of the October Revolution—Nov. 7, 1939." The jury has found that it warrants the description set forth in the indictment, and no argument was addressed to us in criticism of the jury's verdict in that respect.

The appellant was employed in the business of "The Clarion" and his name appears in that paper as its business manager. There is evidence that appellant himself had said that he was manager of The Clarion, in charge of advertising and circulation. The appellant denies that he was in charge of circulation and he challenges the statement of the Crown's witnesses that he had said that he was, but the jury having been specially charged in respect of that matter, found against him.

On the argument of the appeal numerous grounds were put forward on behalf of the appellant and most of them were then dealt with and were disallowed. One of the main grounds of appeal disposed of on the argument was an objection to the indictment which, it was argued, was defective in charging in each of the counts several offences in the alternative, that is, that the

appellant was charged that he "did print, circulate or distribute." As to this objection reference may be made to *Belyea v. The King*, [1932] S.C.R. 279.

The serious objection reserved for further consideration by the Court was with respect to the question of *mens rea*. Was it necessary for the Crown to show intention or a guilty mind on the part of the accused? In connection with this objection it is necessary to consider the appellant's evidence that he first saw the offending article in *The Clarion* when the paper was delivered at his house on 11th November, the day of publication. The trial Judge ruled that neither knowledge by the accused that this article was contained in *The Clarion*, nor an intention on his part to print, circulate or distribute a newspaper or periodical containing an article of the forbidden character were essential elements of the offences charged, and, having so ruled, he did not instruct the jury that such knowledge or intention on the part of the accused must be found by them to have existed. There can be no question that if the learned trial Judge was wrong in this ruling, the conviction cannot stand. It therefore becomes necessary to determine whether or not *mens rea* or knowledge and a guilty mind were essential to a conviction in this case.

It is no doubt the general rule that to constitute an offence against a penal statute or regulation there must be a guilty mind—not necessarily an intention to commit the very offence charged, but at least an intention to do a wrong or to break the law. This rule is not, however, an absolute one. There are exceptions to it. Some of them are cases where a master has been held responsible under a penal statute for the acts of a servant. See *Coppen v. Moore* (No. 2), [1898] 2 Q.B. 306. There are also cases where laws have been made for the protection of the public health or safety or general welfare, and it has been held that their subject matter and purpose and scope are such that to confine their prohibitions and penalties to cases where there is *mens rea* would defeat their object. For example, when a butcher was prosecuted for exposing for sale diseased meat contrary to the provisions of The Public Health Act, it was held that it was no defence that he did not know the meat was diseased. The object of the Act was that people should be protected from the danger of eating what is unfit for food, and that

danger is not mitigated by ignorance or lack of evil intent on the part of the vendor: *Hobbs v. Winchester Corporation*, [1910] 2 K.B. 471. Numerous illustrations of the application of the principle are to be found in the cases cited in that decision. As was said by Stephens J. in *Cundy v. Lecocq* (1884), 13 Q.B.D. 207, "the substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created." It has also been held that to publish matter that tends to corrupt the morals of the public is not justified by the fact that the purpose of the publisher was meritorious: *Steele v. Braiman* (1872), L.R. 7 C.P. 261; *Rex v. St. Clair* (1913), 28 O.L.R. 271.

Turning then to the regulations in this case and to the Act under which they were made, it will be observed that the object of the regulations and the warrant for making them is the public safety. They were made in the emergency of war then threatened and now in progress. They prohibit, in terms that are absolute, certain acts that may interfere with or prejudice the preparations and efforts made for the successful carrying on of the war, or that may be prejudicial to the safety of the State. It would seem plain that both the subject matter and the purpose of the regulations, as well as the terms in which they are expressed, make it necessary to hold that their prohibitions are absolute, and that it is not a defence in a prosecution for their breach to say that what was done was done in ignorance or without intending any harm. The acts prohibited are to be stopped. This ground of appeal therefore fails.

Some support may seem to be found for appellant's contention in the word "intended" which is to be found in the first two counts. It will be observed, however, that the word "intended" is followed by the words "or likely to", and that the whole phrase "intended or likely to" is used in describing the character of the matter published, and not in relation to the acts of printing, circulating or distributing. To constitute printing, circulating and distributing an offence the reports or statements may be either "intended" or "likely to" have the effect stated in the indictment.

An objection taken for the appellant based on the rejection of evidence tendered on his behalf, that others had published the

article in question, or parts of it, also fails. That evidence would be irrelevant and particularly so when the appellant takes the position that personally he had nothing to do with the insertion of the article in *The Clarion*.

In the result none of the grounds relied upon by appellant in the appeal against his conviction can be supported, and that appeal must be dismissed. There remains the appeal against sentence.

The penalty provided by the regulations for their breach is a fine not exceeding \$5,000.00 or imprisonment for not more than five years, or both fine and imprisonment within these limits. The learned trial Judge imposed a penalty of two years' imprisonment in the penitentiary. It is with caution and respect that one approaches the consideration of any alteration in a sentence imposed by the learned Judge who tried this case. Yet, in my opinion there are grounds upon which it should be modified. I do not think the learned Judge magnified in the least the importance of securing strict observance of the regulations made under *The War Measures Act*. Neither do I overlook the fact that whatever may have been the extent of appellant's ignorance of the intention to publish the offending manifesto in *The Clarion*—and on his own evidence one cannot say that it was absolute even if he did not actually see it until after publication—yet he has expressed no disapproval of its publication, nor has he said that his conduct would have been different had he known the manifesto was in the paper. There are, however, other considerations that lead me to think that it is wise to make a modification in the sentence as is herein set forth. In the first place, it would appear that heretofore the appellant has always been a law-abiding citizen, and, judging by his evidence, he is a man of some education and character. In the next place, the conduct which constitutes the offences of which he is convicted is not unlawful in ordinary times, and with this experience the appellant may be wise enough to avoid in future any disobedience of the regulations. They are made for his safety and for the safety of his family as well as for the safety of the public generally. It is further important that there should be no reason to doubt that whatever penalty appellant may suffer is for the very offences of which he is convicted, and for nothing else. Freedom of speech is not abolished among us and is restricted only in so

far as is deemed necessary for the general good in the emergency of war.

The sentence of two years' imprisonment imposed should, therefore, in my opinion, be modified, and the sentence should be for a term of six months definite, and an indeterminate period, not exceeding eighteen months, in a reformatory. This will enable the appellant after the expiration of the six months' period to apply to the Parole Board for his release. The Board will no doubt on such an application give consideration to whatever appellant may put before them by way of assurance that he will observe the regulations in future. The Board will also have it in its power to impose conditions that will secure such observance. The time already spent by appellant in custody under his sentence will count as part of the six months' definite term.

Appeal from conviction dismissed; sentence modified.

[COURT OF APPEAL.]

Rex v. Adduono et al.

Criminal law—Indictments—Form—Conspiracy to defraud—Sufficiency of indictment—Alleged insufficiency of details of the charge—Whether transaction reasonably identified—The Criminal Code, R.S.C. 1927, ch. 36, secs. 444, 853, 855, 863 and 908.

The accused were found guilty by a District Court Judge without a jury under a count in the charge that they "unlawfully did conspire together the one with the other and with other persons unknown by deceit, falsehood or other fraudulent means to defraud the public, the Government of His Majesty for Canada of approximately Five Thousand Dollars (\$5,000.00) in money, contrary to the provisions of sec. 444 of The Criminal Code of Canada and its amendments."

On appeal it was contended by counsel for the appellants that the trial Judge ought to have quashed the above count as lacking in a material averment, namely, that the conspiracy was to defraud the Treasury of Canada by manufacturing and selling alcohol without a license and without paying the excise tax due by law thereon.

Held, by the Court of Appeal that, having regard to the circumstances of the arrest and to the circumstances disclosed by the depositions on the preliminary hearing before the Magistrate, the count conveyed to the accused not only the information that they were charged under sec. 444 of The Criminal Code, but also that the charge related to the manufacture and sale by them of alcohol without paying to the Government of Canada a license fee and without paying the excise duty due by law to the Crown, and thus they had reasonable information as to the act or omission to be proved against them. Therefore the count complied with the requirements of secs. 852, 853, 855(f), 860(2), and 863 of The Criminal Code, and the trial Judge was right in declining to quash the count: *Brodie v. The King*, [1936] S.C.R. 188, considered.

APPEALS by the accused from conviction.

The appeals were heard by ROBERTSON C.J.O., MASTEN and GILLANDERS JJ.A.

A. G. Slaght, K.C., for Joseph Adduono and Mike Sylvestro, appellants.

J. H. McDonald, K.C., for Patsy Adduono, appellant.

C. R. Magone, K.C., *F. W. Callaghan*, K.C., and *Walter Little*, for the Crown.

February 8th, 1940. The judgment of the Court was delivered by MASTEN J.A.:—These are three appeals from convictions by Judge Plouffe sitting in the District Judges' Criminal Court of the District of Nipissing. The convictions are dated November 8, 1939. Joseph Adduono was convicted under Counts 3 and 4 of the indictment. Mike Sylvestro was found guilty under Count 3 of the indictment, and Patsy Adduono was found guilty under Counts 3 and 4 of the indictment. He has no appeal against his conviction under Count 4.

The indictment so far as it becomes in question on this appeal reads as follows:

"In the District Court Judges' Criminal Court of the District of Nipissing.

Canada,
Province of Ontario,
District of Nipissing.

To Wit:

{ Carmelo Ippolito,
Vincenzo Priolo,
Mike Sylvestro,
Patsy Adduono,
Joseph Adduono,
Frank Schiavone, and
Charles Quino.

"Stand charged this 30th day of October, in the year 1939, before His Honour Judge J. A. S. Plouffe, Judge of the District Court of the District of Nipissing, exercising criminal jurisdiction under the provisions of the County Court Judges' Criminal Courts Act and Part XVIII of the Criminal Code, sitting in open public Court assembled for the trial of the said prisoners, for that the said Carmelo Ippolito, Vincenzo Priolo, Mike Sylvestro, Patsy Adduono, Joseph Adduono, Frank Schiavone and Charles Quino;

"Count (3) And further that you Carmelo Ippolito, Vincenzo Priolo, Mike Sylvestro, Patsy Adduono, Joseph Adduono, Frank Schiavone and Charles Quino in the City of North Bay in the District of Nipissing and elsewhere in the Province of Ontario,

in the years 1938 and 1939, unlawfully did conspire together the one with the other and with other persons unknown, by deceit, falsehood, or other fraudulent means to defraud the public, the Government of His Majesty for Canada of approximately Five Thousand Dollars (\$5,000.00) in money. Contrary to the provisions of sec. 444 of the Criminal Code of Canada and its amendments;

"Count (4) And further that you Patsy Adduono, Joseph Adduono, Frank Schiavone, Mike Sylvestro and Charles Quino stand charged that you unlawfully did on or about the 15th day of April, 1939, in the City of North Bay, in the Province of Ontario, have in your possession a quantity of spirits unlawfully manufactured, to wit: approximately one hundred and sixteen (116) gallons of illicit spirits in a garage at the rear of 207 Third Avenue West, in the said City, contrary to sec. 169 of The Excise Act, 1934, and its amendments."

In respect to Count 3, two questions only were argued before this Court: (1) that the trial Judge ought to have quashed the indictment as lacking in a material averment, namely, that the conspiracy was to defraud the Treasury of Canada by manufacturing and selling alcohol without a license and without paying the Excise Tax due by law thereon; (2) that if the indictment was not invalid, then that the evidence was inadequate to warrant the several convictions which were recorded by the trial Judge.

With respect to Count 4 quoted above, the contention of the appellants Joseph Adduono and Mike Sylvestro was that the evidence does not show them to have been in possession of spirits unlawfully manufactured.

I deal first with the contention of the appellants' counsel that the motion to quash count 3 ought to have been granted.

As a preliminary observation I refer to two passages in the illuminating judgment of Rinfret J. in *Brodie v. The King*, [1936] S.C.R. 188. At page 199 it is said: "We do not want to part with this appeal, however, without saying that our decision is strictly limited to the points in issue. We would not like to be taken as subscribing to certain generalities contained in some of the judgments to which we have been referred and which would tend to convey the idea that notwithstanding the coming into force of the Criminal Code, the criminal law in this country should continue to be administered as though there were no

Code.” And at page 198: “It need not be added that we are speaking now of counts in general without reference to special cases such as are libel, perjury, false pretences or other cases which are the objects of special provisions with regard to indictment in the Criminal Code.”

These observations accord with the words of sec. 10 of the Code, making it clear that in this Province the supreme guide and over-riding authority with respect to procedural, as well as substantive, criminal law is that which is embodied in the existing statute law as enacted by the Parliament of Canada.

My study of the existing provisions of the Code (secs. 853 and following, and including sec. 908) leads me to the view that their spirit and purpose is to secure to the accused, when preparing for trial, such exact and reasonable information respecting the charge against him as will enable him to establish fully his defence. At the same time these sections are directed to a second purpose, namely, to nullify the old procedure with the purpose of ameliorating its extreme technicality and facilitating the administration of justice in accordance with the very right of the case. In that aspect they ought to receive “such fair, large and liberal construction and interpretation as will best secure the attainment of both of the two purposes above noted.”

The indictable offence which by count 3 is alleged to have been committed by the accused is enacted by sec. 444 of the Code, which reads as follows:

“444. Conspiracy to defraud.—Every one is guilty of an indictable offence and liable to seven years’ imprisonment who conspires with any other person, by deceit or falsehood or other fraudulent means, to defraud the public or any person, ascertained or unascertained, or to affect the public market price of stocks, shares, merchandise, or anything else publicly sold, whether such deceit or falsehood or other fraudulent means would or would not amount to a false pretense as hereinbefore defined.”

Sec. 853 of the Code requires two things: first, that the indictment shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him; second, that the Crown shall reasonably identify the transaction referred to.

Then follows this rider: “that the absence or insufficiency of such details shall not vitiate the count.” This is discussed

and explained in the *Brodie* case at p. 195, where it is said: "It should be noticed, however, that the proviso as well as the section itself relates only to the 'absence or insufficiency of details.' It does not detract from the obligation resulting from sec. 852 that the substance of the offence should be stated in the indictment."

I think that in count 3 there is stated the substance of the offence, namely, a conspiracy to defraud the Crown of certain moneys. The means by which the conspiracy was to be put in execution is a detail not essential to the validity of the indictment. If the Court on application deemed it desirable, in order to insure a fair trial, that such detail should be supplied, particulars can be ordered, but none appears to have been asked for.

Supplementing the provision that "the absence or insufficiency of such details shall not vitiate the count" we find two provisions of the Code which I think apply specifically to this count. Sec. 855(f) provides: "No count shall be deemed objectionable or insufficient for the reason only (f) that it does not specify the means by which the offence was committed."

In the present case the means by which the Crown was to be defrauded was the manufacture and sale of alcohol without paying a license fee and without paying the excise duty, and the statute provides that the omission to specify the "means" does not vitiate the count.

We find, however, a further provision under the Code which in terms applies to this count. Sec. 863 provides that "no count which charges . . . any fraud or any attempt or conspiracy by fraudulent means shall be deemed insufficient because it does not set out in detail in what . . . the fraud or fraudulent means consisted." This provision was not applicable in the *Brodie* case.

This leads me to the conclusion that the material allegation of the count, namely, "a conspiracy to defraud the Crown of certain moneys", contains all the material averments of matter as well as of time, place and person, constituting the fundamental ingredients of the particular crime which is charged in such a way as to specify the transaction intended to be brought against the accused, and that any further statement of details or means is unnecessary under the provisions of the Code.

In considering the position of the trial Judge when ruling as to whether this count does provide the accused with reason-

able information as to the act or omission to be proved against them, and as to "whether the alleged defect in the indictment is material to the substantial justice of the case," the Court may under sec. 860, subsec. 2, have regard to the surrounding circumstances disclosed by the depositions on the preliminary hearing before the Magistrate. These depositions are not in the papers before this Court, and it is not clear whether the trial Judge relied upon them in reaching his conclusion. The only reference to them which I have found appears at the top of p. 18 of the evidence, where counsel for the Crown *arguendo*, says: "There was a very full and complete inquiry at which my learned friend, Mr. Slaght, was also present, and there were sixty pages of depositions taken at that time, and therefore I feel that the particulars were all in the hands of the accused."

There can be no doubt that under the circumstances of the arrest the indictment as drawn conveyed to the accused not only information that they were charged under sec. 444 of the Code, but also that the charge related to their manufacture and sale of alcohol without paying to the Government of Canada a license fee and without paying the excise duty due by law to the Crown, and thus they had reasonable information as to the act or omission to be proved against them.

The second requirement of sec. 853 of the Code is that the count shall "identify the transaction referred to." So far as this requirement relates to the adequacy of the notice afforded to the accused by count 3, it is met by what I have said above, but there still remains the question whether the indictment affords sufficient identification of the transaction referred to in case of a plea of *autrefois acquit* or *autrefois convict* is raised in answer to a subsequent prosecution.

This difficulty appears to be adequately met by sec. 908 which reads as follows:

"908. On the trial of an issue on a plea of *autrefois acquit* or *autrefois convict* the depositions transmitted to the Court on the former trial, together with the Judge's and official stenographer's notes if available, and the depositions transmitted to the Court on the subsequent charge, shall be admissible in evidence to prove or disprove the identity of the charges." By this provision all possibility of any difficulty or prejudice arising out of supposed identity of the two prosecutions is obviated.

With respect to the sufficiency of the evidence to identify the several accused with the conspiracy in question and with possession as alleged under count 4, I can find no ground for interfering with the conclusion of the trial Judge either in the case of Mike Sylvestro or in the case of Patsy Adduono, and the appeal as to them should be dismissed. In the case of Joseph Adduono I cannot find any evidence that he was a party to the conspiracy, or that he was in possession of illicit spirits. His mere presence is not sufficient for that purpose. As to him, I would therefore allow the appeal and quash the conviction.

Appeals of Mike Sylvestro and of Patsy Adduono dismissed; appeal of Joseph Adduono allowed and conviction quashed.

[COURT OF APPEAL.]

Godfrey v. Good Rich Refining Co. Ltd. et al.

Nuisance—Odours—Noise—Residential property adjacent to oil refinery—Character of neighbourhood—Injunction—Damages.

By the judgment of Hogg J. reported in [1939] O.R. 106, the plaintiff was awarded an injunction restraining the defendant from operating its oil refinery in the Village of Port Credit, in such a way as to permit noxious or ill-smelling odours to be emitted so as to cause a nuisance at the plaintiff's residence. The learned trial Judge granted the injunction only and not damages and he also found that the claim of the plaintiff with respect to noises was not established.

Both the plaintiff and the defendant appealed to the Court of Appeal from the judgment of Hogg J.

Held, by the Court of Appeal, that the appeal by the defendant and the cross-appeal by the plaintiff should both be dismissed. The plaintiff, on the finding of facts by the learned trial Judge, was entitled to an injunction with respect to the disagreeable odours and there was no inconvenience to the defendant likely to arise from such injunction as would warrant a substitution of damages for an injunction. There was no physical injury to the property of the plaintiff by the gasses which caused the offensive odours and the plaintiff could not claim damages in addition to the injunction.

AN appeal by the defendants and a cross-appeal by the plaintiff from the judgment of Hogg J. reported in [1939] O.R. 106.

February 6th, 7th, 8th and 9th. The appeal was heard by ROBERTSON C.J.O., McTAGUE and GILLANDERS JJ.A.

W. N. Tilley, K.C., and *C. F. H. Carson*, K.C., for the defendants, appellants.

R. H. Sankey, K.C., and *T. R. Godfrey*, for the plaintiff, respondent.

March 20th, 1940. The judgment of the Court was delivered by ROBERTSON C.J.O.:—This is an appeal by the defendants in the action from the judgment of Hogg J. dated 3rd February, 1939. There is a cross-appeal by the plaintiff.

The appellant, Lloyd Refineries Ltd., established an oil refinery in the Village of Port Credit in 1933, and after operating the refinery for three or four years, leased it to the appellant, Good Rich Refining Co. Ltd., on or about 29th July, 1937. The latter Company has operated the refinery since that time. The respondent is the owner of a valuable residence property of about six acres, projecting into the lake, at the westerly end of the village. The distance between the premises of the refinery and respondent's premises is some 2,000 feet.

A full statement of the circumstances under which the claim arises is set forth in the reasons for judgment of the learned trial Judge. Respondent says that the enjoyment of her residence property is seriously interfered with by disagreeable odours, noises, contamination of the lake water and of the beach by oil and dirt, and she claims that all of these come from the oil-refinery. To these annoyances she adds what she describes comprehensively in her evidence as "incidental things such as the fear engendered by the proximity of such a plant." She alleges that the erection and operation by the appellants of the oil-refinery has rendered her property useless as a country estate and summer residence. The learned trial Judge found that there are odours from the refinery that respondent has a right to complain of, and he has granted her an injunction as to that matter, but he granted her no further relief. It is really not disputed that at times there are noises from appellants' operations, which may be heard at respondent's residence and which respondent and members of her household say they find disturbing. No relief was granted in regard to them, and the failure to do so is one of the grounds of the cross-appeal. As to the other matters of which respondent complains, the learned trial Judge found that there is no evidence that appellants are responsible for them, and no appeal is taken from that finding.

I have considered with care all the evidence bearing upon the question of the odours complained of by respondent, and I am of the opinion that there is substantial evidence to support the findings of the learned trial Judge, that the respondent "suf-

ferred discomfort from an evil-smelling and disagreeable odour which invaded the plaintiff's residence and grounds on many occasions", and "that the odours complained of by the plaintiff are caused by the oil refining operations carried on by the defendants." A formidable case to the contrary was presented for appellants at the trial on both of these matters. These are questions of fact, and a finding in appellants' favour by the learned trial Judge would have been difficult to reverse. It seems plain, however, that to find for the appellants the learned trial Judge would have had to disbelieve the evidence of respondent and of several witnesses who supported her, and he has not done so. On the contrary he has believed them, and his judgment on that matter must stand.

It would appear from the evidence of the expert witnesses called by appellants that it is possible to operate their modern and well-equipped refinery without causing offensive odours that would be noticeable at any considerable distance, provided none but a proper grade of crude oil is brought in for refining. There is, therefore, no such inconvenience likely to arise from an injunction that restrains appellants from operating their refinery in such a manner as to permit noxious or ill-smelling odours to be emitted so as to cause a nuisance at respondent's residence, as would warrant the substitution of damages for an injunction.

A matter that has given me great concern is the changing character of the whole district west of Toronto, especially along the lake shore. The City of Toronto itself has doubled in population since respondent's property was acquired, and there has been a resulting growth in its suburbs. The population of Port Credit has multiplied. A whole countryside to the west of Toronto, as in other directions, has lost the character of a quiet farming district. Industrial works for which a location in or near a large city is desirable, and that could more readily obtain the space or facilities they require outside the city limits, have been established at places where transportation by rail or by water or both, are available, and Port Credit can provide both. It would seem inevitable that respondent's valuable and most attractive residence property has suffered and will continue to suffer from those altering conditions. The Corporation of Port Credit, within whose limits respondent resides, might perhaps have preserved it as a residential area and have either excluded industrial works or confined them to a limited part of the muni-

cipality, but the Corporation has not seen fit to do so. These conditions, together with the presence of oil and dirt in the water of the lake, which washes it up on the beach, to the great annoyance of respondent and others, make the assessment of damages for the nuisance caused by obnoxious odours, for which alone appellants are held liable, a matter of great difficulty. The difficulty is increased by the fact that plainly appears, that opinions widely differ as to the degree of annoyance caused by the odours.

It is quite out of the question that respondent should have damages for the depreciation of her property, as well as an injunction. There has been no physical injury to the property by the gases which cause the offensive odours. They are not noxious in that sense, nor do they impair the health of the occupants. Each time the odours come is a separate occasion and the effect is gone as soon as the gases are dissipated. The injunction will put an end to such occurrences. No doubt respondent suffered discomfort and has not had the full enjoyment of her property as a residence by reason of the offensive odours, at such times as they were present, but there was no attempt to prove either the amount of such damages or any facts that would form a basis for estimating them. There is a record of days for part of the year, 1938 when odours were noticed, but nothing upon which one could make even a guess as to the damage suffered. The evidence at the trial on the quantum of damage was in fact confined to injury to the selling value of the property, and, as already stated, the granting of an injunction puts an end to damage of that nature.

I am unable, therefore, to see any reason for altering the judgment of the trial Judge by awarding damages to respondent, as asked by way of cross-appeal. Nominal damages are all that could be awarded upon the evidence, and I think it is not a case for a reference.

The learned trial Judge dealt with the claim respecting the noises which respondent objects to, by referring to the judgment in an action of *Houston v. Lloyd Refineries*, [1937] O.W.N. 53, by which an injunction was granted against certain noisy operations being carried on except between 7 a.m. and 8 p.m. This judgment is, of course, not one which respondent can enforce, and Good Rich Refining Co. Limited was not a party to that action.

I presume, however, that what the learned trial Judge had in mind was that since the date of that judgment the operations that made the objectionable noises have not been carried on except within the permitted hours, and as Good Rich Refining Co. Limited, which now operates the refinery, did not take it over until after the date of that judgment there is nothing to complain of in the way of noises, so far as that Company is concerned, unless it is within the hours permitted by that judgment, and that he considered was not an unreasonable or wrongful use of appellants' property.

This matter of noise is one of the matters in connection with which the growth of the Village and the altered character of the neighbourhood, already referred to, are important, and I am not prepared to disagree with the disposition made by the trial Judge of this branch of the case.

I would, therefore, dismiss the appeal with costs, and the cross-appeal without costs, the cross-appeal not having added substantially to the time taken in argument.

Appeal of defendants dismissed with costs; cross-appeal of plaintiff dismissed without costs.

[COURT OF APPEAL.]

Rex v. Grand.

Municipal Corporations—By-law providing for early closing of shoe repair shops—By-law not in accordance with petition filed—Invalidity of by-law—The Factory, Shop and Office Building Act, R.S.O. 1937, ch. 194, sec. 82(3, 4 and 5).

By subsecs. 4 and 5 of sec. 82 of The Factory, Shop and Office Building Act, R.S.O. 1937, ch. 194, if an application is presented to the council of a municipality asking for the passing of a by-law requiring the closing of any class of shops situate within the municipality and the council is satisfied that such an application is signed by not less than three-fourths in number of the occupiers of shops within the municipality belonging to the class to which such application relates, the council shall, within one month after the presentation of such application, pass a by-law giving effect thereto and requiring all such shops to be closed and remain closed at certain hours on certain days as are named in the application.

An application was presented to the council of the City of Toronto, signed by three-fourths in number of the occupiers of shoe repair shops in the said City, praying that a by-law be passed for early closing at the times and on the days specified in the application. Pursuant to the said application the council passed a by-law providing for closing of such shops at eight o'clock in the afternoon on Monday, Tuesday, Thursday and Friday "except any of the said days immediately preceding a statutory holiday." The by-law also provided for hours of closing on Wednesdays and further stated that on Saturdays "and each day which immediately precedes a statutory holiday" the hour of closing should be 10.30 o'clock in the afternoon. The application, however, did not conform to the by-law, in that the application did not contain, with reference to Monday, Tuesday, Thursday and Friday, the words "except any of the said days immediately preceding a statutory holiday" and did not make any reference to hour of closing on days immediately preceding a statutory holiday. *Held*, by the Court of Appeal, that the failure of the by-law to comply with the terms of the application in respect to closing on certain days vitiated the by-law not only with respect to those days, but with respect to all the days covered by the by-law. It could not be said that if the application on which the by-law was founded had contained the words added in the by-law certain of the petitioners would not have refused to sign it, and the required percentage of petitioners might never have been obtained. The fundamental defect vitiated the whole proceeding and the Court could not separate the good from the bad and preserve the former.

AN appeal by the City of Toronto, pursuant to a certificate of the Attorney-General for Ontario under sec. 14(2) of The Summary Convictions Act, R.S.O. 1937, ch. 136, from an order of His Honour Judge Honeywell, of the County Court of the County of York, allowing an appeal by the accused from a conviction by Magistrate Prentice for having kept his shoe repair shop open after 1 p.m. on Wednesday, January 10th, 1940, contrary to By-law 15270 of the City of Toronto.

The appeal was heard by ROBERTSON C.J.O., MASTEN and FISHER JJ.A.

F. A. A. Campbell, K.C., for the City of Toronto, appellant.
J. R. Robinson, K.C., for the accused, respondent.

April 27th, 1940. The judgment of the Court was delivered by MASTEN J.A.:—This is an appeal by the City of Toronto from the judgment of His Honour Judge Honeywell, Judge of the County Court of the County of York, dated March 4th, 1940, allowing an appeal from the order of Magistrate Prentice who convicted and fined the said Lawrence Grand for having kept his shoe repair shop open after 1 p.m. on Wednesday, January 10th, 1940, contrary to By-law No. 15270.

The appeal from the acquittal of the accused is brought by leave of the Attorney-General given pursuant to sec. 14, subsec. 2 of The Summary Convictions Act, R.S.O. 1937, ch. 136, on the ground that in his opinion the judgment or decision of His Honour Judge Honeywell involves a question of law of sufficient importance to justify an appeal to the Court of Appeal of Ontario.

The question in this case turns solely on the validity of the by-law in question, the fact that the accused kept his shop open in contravention of the by-law not being disputed, as appears by the following admissions, being Exhibit 3:

“Solely for the purpose of this appeal and any further appeal therefrom the defendant Lawrence Grand admits that he was the proprietor or occupier of the shoe repair shop mentioned in the information herein and that on the date and at the time mentioned in the information such shop was open for the purpose of shoe repairing.

“The respondent will produce a copy of the petition which the defendant Lawrence Grand will admit for the purposes of this appeal and any further appeal therefrom to be sufficiently signed and both parties will consent that a copy rather than the original be filed as an Exhibit.

“Dated at Toronto this 4th day of March, 1940.”

The by-law in question reads as follows:

“No. 15270. A By-law

“To require the closing of Shoe Repair Shops during certain hours.

(Passed December 11th, 1939.)

“The Council of the Corporation of the City of Toronto enacts as follows:

I.

"All shoe repair shops within the City of Toronto shall during the whole of the year be closed and remain closed on the days of the week set forth in column 1 of the schedule hereto between the hour set forth opposite such days in column 2 of the said schedule and the hour of five of the clock in the forenoon of the next following day.

"Column 1	Column 2
Monday, Tuesday, Thursday and Friday except any of the said days immediately preceding a statutory holiday	8 o'clock in the afternoon.
Wednesday, except Wednesdays in the weeks in which there is a statutory holiday, other than Sunday	1 o'clock in the afternoon.
Saturday and each day which immediately pre- cedes a statutory holiday	10.30 o'clock in the afternoon.

II.

"Every occupier or person in charge of a shoe repair shop shall close same and keep same closed as required by the provisions of Section I.

III.

"This By-law shall take effect on the 23rd day of December, 1939, and shall be subject to the provisions of The Factory, Shop and Office Building Act.

IV.

"Every person who contravenes any of the provisions of this By-law shall, upon conviction thereof, forfeit and pay at the discretion of the convicting magistrate, a penalty not exceeding (exclusive of costs) the sum of \$50.00 for each offence.

R. C. Day,
Mayor.

J. W. Somers,
City Clerk.

Council Chamber,

Toronto, December 11th, 1939.

(L.S.)"

This by-law was passed in pursuance of the following petition, which is Exhibit 2 on the hearing:

"We hereby petition the Council of the City of Toronto in the County of York to pass a by-law requiring the

Closing of Shoe Repair Shops

on Monday and Tuesday at 8 p.m. and on Wednesday at 1 p.m. saving and except in any week in which there is a legal holiday other than Sunday and on Thursday and Friday at 8 p.m. and on Saturday at 10.30 p.m. and to remain closed until 5 o'clock of the forenoon of the next day following."

The statutory authority conferring on the appellant Corporation authority with respect to the closing of shops is found in sec. 82 of The Factory, Shop and Office Building Act, R.S.O. 1937, ch. 194, and the subsections thereof which were discussed before this Court in the course of the argument are subsecs. 3, 4 and 5, which read as follows:

"(3) The council of a city, town or village may by by-law require that during the whole or any part or parts of the year all or any class or classes of shops within the municipality shall be closed, and remain closed on each or any day of the week at and during any time or hours between seven of the clock in the afternoon of any day and five of the clock in the forenoon of the next following day, but no such by-law shall be deemed to apply to the sale of fresh fruit.

"(4) If an application is presented to such council praying for the passing of a by-law requiring the closing of any class of shops situate within the municipality, and the council is satisfied that such application is signed by not less than three-fourths in number of the occupiers of shops within the municipality belonging to the class to which such application relates, the council shall, within one month after the presentation of such application, pass a by-law giving effect thereto and requiring all shops within the municipality belonging to the class specified in the application to be closed during the period of the year and at the times and hours mentioned in subsec. 3 as are named in the application.

"(5) If an application is presented to the council of a city, town or village praying for the passing of a by-law requiring the closing of any class of shops situate within the municipality and the council is satisfied that such application is signed by not less than three-quarters in number of the occupiers of shops within the municipality belonging to the class to which such application relates, the council shall, within one month after the presentation of such application, pass a by-law giving effect thereto

and requiring all shops within the municipality belonging to the class specified in the application to be closed and remain closed on one particular day of the week during such time or hours between twelve-thirty o'clock noon and five of the clock of the forenoon of the next following day and during such periods of the year as are named in the application."

After careful consideration of the interesting arguments which were presented before us I have reached the conclusion that while the by-law under which this conviction is made accords with the petition insofar as it relates to closing at one o'clock in the afternoon on "Wednesday except Wednesdays in the weeks in which there is a statutory holiday, other than Sunday," yet the by-law goes beyond the petition where it provides for closing at 10.30 p.m. on Saturday "*and each day* which immediately precedes a statutory holiday." If the day preceding a holiday should happen to be Wednesday the by-law would apply and the hour of closing would be 10.30. But the petition provides no foundation for such a provision. Not only so, but the by-law adds to the words of the petition the provision "except any of the days immediately preceding a statutory holiday" (where it is dealing with the days of the week other than Wednesday). Consequently the by-law, not agreeing with the petition, is invalid and ineffective, and the conviction under it was properly set aside.

It is manifest from the internal evidence afforded by a comparison of the petition and by-law, as well as by a consideration of the surrounding circumstances, that in passing this by-law the City Council was exercising the jurisdiction conferred on it by subsecs. 4 and 5 above quoted, and did not assume to act under subsec. 3 (*supra*). Indeed it could not under subsec. 3 pass a by-law for closing at any earlier hour than 7 p.m.

If, as I think, the by-law was passed in the exercise of the jurisdiction conferred by subsecs. 4 and 5, then the action taken by the Council was obligatory on it. The statute provides that the Council *shall* within one month pass the by-law. Not only so, but a consideration of the closing words of subsecs. 4 and 5 makes it clear (at least to me) that they have no discretionary power to add to, subtract from, or vary the provisions of the petition.

And the reason is plain. To deprive a cobbler of the right to exercise his legitimate calling after 12.30 o'clock on Wednesday

afternoon is a dictatorial and undemocratic act which can be justified only if it is the *bona fide* desire of three-quarters of the cobblers of the city, and it is the duty of the Court in such circumstances to maintain a strict scrutiny over the exercise of such powers.

For these reasons I think that any substantial departure from the terms of the petition will vitiate the by-law and render it invalid.

The failure of the by-law to comply with the terms of the petition in respect not only to closing on Monday, Tuesday, Thursday, Friday and Saturday but also on Wednesday vitiates, in my opinion, the whole by-law including Wednesday afternoon closing. It cannot be partly good like the curate's egg, for it was one petition and one by-law. This Court cannot say that if the petition on which the by-law is founded had contained the words "except any of the said days immediately preceding a statutory holiday" certain of the petitioners would not have refused to sign it and the required percentage of petitioners might never have been obtained. In this way the fundamental defect in question vitiates the whole proceeding, and the Court cannot separate the good from the bad and preserve the former.

I think that the distinction taken by counsel for the respondent in regard to the cases where the provisions of the by-law have been held to be severable is sound, namely, that where the by-law is passed by a municipal council in the exercise of its discretion, those parts where they exceeded their statutory authority may be held bad, while the parts within their powers are held good; but that is not this case for they had no discretion.

For these reasons I am of opinion, as above stated, that the by-law is invalid, and that this appeal should be dismissed. Costs will follow the result.

Appeal dismissed with costs.

[COURT OF APPEAL.]

Lamport v. Thompson et al.

Limitation of actions—Trusts—Action for damages for alleged breach of trust—Action by beneficiary who has a life interest in possession and a contingent future interest in capital—Meaning of proviso in sec. 46(2)(b) of The Limitations Act, R.S.O. 1937, ch. 118, that time “shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession”—Whether plaintiff can maintain action with respect to her contingent future interest when action barred with respect to her interest in possession.

By sec. 46 of The Limitations Act, R.S.O. 1937, ch. 118, a trustee in an action against him for breach of trust is entitled to the benefit of a six year limitation period, subject to certain provisos, one of which is that the time “shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession.”

Held that this proviso does not permit a beneficiary who has both a life interest in possession and a contingent interest in capital to maintain an action against a trustee for breach of trust if such action has been barred by lapse of time with respect to the interest of the beneficiary in possession. The beneficiary can be barred only once in respect of the same cause of action taken by him under the same instrument, and there is nothing in the proviso to prevent the Statute running against a beneficiary when his cause of action is ripe and he has an interest in possession.

AN action by a beneficiary against trustees for relief for an alleged breach of trust.

The action was tried by HOGG J., without a jury, at Toronto. *R. L. Kellock*, K.C., and *J. E. Tansey*, for the plaintiff.

D. L. McCarthy, K.C., and *K. G. Morden*, for The Chartered Trust and Executor Company, a defendant.

F. J. Hughes, K.C., for H. A. and S. A. Thompson, defendants.

December 4th, 1939. HOGG J.:—The plaintiff is a daughter of, and a beneficiary under the will of, the late Alexander Montgomery Thompson, who died on the 18th October, 1929.

The defendants are executors and trustees of the said will, and the defendants Harry Alcroft Thompson and Stanley Alexander Thompson are brothers of the plaintiff and are the residuary legatees by the terms of the will, probate of which was granted to the defendants on the 4th December, 1929. The will places all of the estate in the hands of the testator's executors and trustees upon certain trusts, one of which is “to set apart for the benefit of my daughter Edythe G. Lamport the sum of one hundred thousand dollars (\$100,000) and to keep the same invested in good legal securities, and pay to her the sum of twenty-five hundred dollars (\$2,500) per year, out of the net

revenue thereof, for a period of the first ten years after my decease, and after the expiration of the said period of the first ten years after my decease, she is to receive the full revenue from the one hundred thousand dollars so set apart for her, together with any increase that there may be to the same owing to her receiving only a portion of the net revenue therefrom for the said period of ten years. This last mentioned full net revenue is to be paid to her for the balance of her natural life only. Should it be desirable on her part to receive the net revenue in monthly instalments such may be paid to her in monthly instalments. Should my said daughter become a widow then she shall receive the corpus of her share in my estate. After the death of my said daughter Edythe G. Lamport, prior to her becoming a widow, the above bequest so set apart for her benefit shall revert and become part of the residue of my estate, and shall be equally divided between my two sons Harry Alcroft Thompson and Stanley Alexander Thompson."

The testator also provided that, after the above mentioned fund was set apart for the benefit of the plaintiff, the rest and residue of the estate was to be divided between the testator's said two sons, in equal shares.

The first paragraph of the will is material in view of the issues raised in this action. This paragraph reads:

"I give to my executors and trustees full power of sale over all the assets of my estate, this power to include the power of exchange of any or all properties, and the power to retain any of my investments (whether or not any of such investments are considered legal securities) for such time as my executors and trustees in their discretion may deem feasible or expedient, and no responsibility for loss due to the holding of any of my investments shall attach to my executors and trustees".

The assets of the estate of the late Mr. Thompson consisted of \$28,000 of real estate, a mortgage for \$30,000, and the remainder was made up of \$1,500 of bonds, a certain amount of cash, and \$260,971.10 represented by shares of stock in various companies. The largest holding of shares, valued at the time of the testator's death at approximately \$200,000, was in the Dominion Automobile Company, Limited. The balance of the shares of stock were in mining and distillery companies. The mortgage for \$30,000 had been given by the testator on the 1st February, 1922, to a Mrs. Emma V. Campbell, upon a prop-

erty owned by the late Mr. Thompson situated on the south-east corner of Yonge and Collier Streets in Toronto. This property was conveyed by Mr. Thompson to the Dominion Automobile Company Limited, subject to the mortgage, on the 5th July, 1926.

The executors state that, after the payment of debts and succession duties, there were immediately available for the purpose of establishing the trust fund, the proceeds of bonds amounting to \$1,000, also cash amounting to approximately \$29,000, part of which was invested by the trustees in mortgages, and the mortgage for \$30,000, and these assets representing the sum of \$60,000 were very shortly after Mr. Thompson's death set apart as part of the plaintiff's trust fund.

The evidence placed before the Court is voluminous and being directed, in some part at least, to matters which do not appear to be specifically raised by the pleadings, tends to obscure to some extent the issues which are presented for determination. The plaintiff alleges:

(1) That although there were assets of the estate capable of being realized to an amount in excess of the sum of \$100,000 required to set up the trust fund, the defendants failed in their duty as trustees in that they did not upon the death of the testator establish the whole of the trust fund for the benefit of the plaintiff;

(2) That the mortgage for \$30,000 upon the property known as the Collier Street property, was not a good and sufficient security for that amount for the reason that the land and building covered by the mortgage were not, at the time the mortgage was allocated to the trust fund, of sufficient value to secure repayment of the principal money, and the income from the property was insufficient in amount to pay the expenses incurred in connection with the property, and that the mortgage was not a security which could be realized in the event of default. It is alleged that the defendants, knowing that the mortgage was not ample security for its nominal amount, failed in their duty as trustees in allotting this mortgage to the plaintiff's trust fund. It was stated by counsel on behalf of the plaintiff that this ground of dispute forms the main issue in the action.

(3) That at no time until immediately before action was commenced on the 19th March, 1937, did the plaintiff have

knowledge that the mortgaged premises were not, either in respect to their value or the income derived therefrom, a sufficient security for the sum of \$30,000. The plaintiff alleges that had she been possessed of such information and had had independent advice, she would not have consented to this mortgage forming one of the trust assets under the agreement into which she entered with the executors on the 7th August, 1931. The plaintiff claims the agreement to be void and of no effect.

(4) That the defendants have been guilty of a breach of trust in not enforcing the covenant of the late Mr. Thompson in the mortgage in question against his estate.

(5) That the interests of the plaintiff and the defendants the Thompson brothers are of so conflicting a nature that the present trustees should be removed from office.

In brief, the defendants' answer to these allegations is, that the mortgage of \$30,000 when put into the trust fund in 1929, was a good and sufficient security; that the plaintiff was aware at that time and at all times of the state of the mortgaged premises and of the revenues derived therefrom; that she executed the agreement attacked with knowledge of all facts concerning the mortgage and the condition and state of the mortgaged premises and that she has accepted and retained all benefits under the agreement and has acquiesced in, and cannot now after a long lapse of time repudiate, the agreement. The defendants further say that the estate is not liable upon the covenant to pay the mortgage money contained in the mortgage for \$30,000, in question.

The defendants claim the protection of the Trustee Act, R.S.O. 1927, ch. 150, sec. 34, and say that in allocating the mortgage to the trust fund they acted honestly and as reasonable men and ought fairly to be excused.

The defendants also claim that the action is barred by the Statute of Limitations, R.S.O. 1927, ch. 106, sec. 46, and The Surrogate Courts Act, R.S.O. 1927, ch. 94, sec. 65.

The late Mr. Thompson had built up a successful and prosperous business of selling motor cars, and had incorporated his business under the name of The Dominion Automobile Company, Limited. At the date of the testator's death, the 192 shares which he held in The Dominion Automobile Company were valued for succession duty purposes at the sum of \$216,000,

and the company had approximately \$200,000 cash in its treasury. The shares of stock in the mining and distillery companies were valued at \$60,488 at the time of the testator's death, but, due to the general depression in the value of securities, these shares had suffered a loss in value at the date probate was granted, of twenty-five per cent., and their value continued to decline. It is to be noted that it was in the year of Mr. Thompson's death that what has been sometimes termed the "great depression", which affected business and financial affairs throughout the world, had its beginning.

The evidence shows that within several weeks after probate was issued, the executors and the plaintiff met to discuss the affairs of the estate including the setting up of the plaintiff's fund of \$100,000, and shortly after this meeting the trust fund was established to the extent of \$60,000. The plaintiff was fully aware at that time that the mortgage for \$30,000 was included in the securities comprising the \$60,000 aforesaid. The plaintiff's brothers, the defendants Harry and Stanley Thompson, proposed that they be given an opportunity to find sufficient funds to pay the liabilities of the estate and to set up the balance of the plaintiff's trust fund so that they might then take over the residue of the estate bequeathed to them by their father. This arrangement was embodied in a letter of the 12th December, 1929, from the defendant Trust Company to their co-trustees. On September 18th, 1930, the Trust Company informed their co-trustees by letter that the amount which would be required to complete the transaction was the sum of \$58,497.36. As the Thompson brothers were unable to raise the sum required to take over the residue of the estate, the Trust Company then considered selling certain of the securities in order to complete the fund provided for the plaintiff under the will of her father; and at this juncture the Thompson brothers, through their solicitors, wrote the Trust Company on the 19th November, 1930, that they had decided that the assets of the estate should not then be sold owing to the depressed state of the market for securities.

The will provides that, "Should my executors and trustees not all be of one mind regarding the disposition and management of my estate then I direct that the desire or conclusion of any two of the three of my executors and trustees shall prevail, in

any particular matter pertaining to my estate or its management”.

The trustees not being in agreement, it was not possible to sell shares of capital stock of the several companies, comprising part of the estate, and invest the proceeds in securities authorized by law as directed by the will, to complete the trust fund in question. Due to the fact that the plaintiff was pressing the executors to set up the fund in full for her benefit, legal advice was sought by the defendant Trust Company, and as a result of such advice a proposal was made by that defendant for an agreement between parties with a view to a settlement of the difficulties which had arisen. After considerable discussion and negotiation, a settlement was reached which culminated in the agreement of the 7th August, 1931, between the plaintiff and the defendants.

In view of the fact that the defendants have pleaded the Statute of Limitations in bar of the action, I consider that this question should first receive consideration in its effect upon the claims of the plaintiff.

With respect to the main contention of the plaintiff as advanced at the trial, that the defendants in violation of their duty as trustees allotted to the plaintiff's trust fund a mortgage which was not a trust security and which was not a good and sufficient security for the amount purported to be secured by the mortgage, it is to be observed that there is no direct plea in the statement of claim that the action of the defendants in placing this mortgage security in the trust fund was a breach of trust other than the allegation in paragraph 8 that the mortgage was not a trust security.

The meaning which the plaintiff intends to place on this allegation, to be gathered from the argument advanced on her behalf, is doubtless that the mortgage was not a trust security because it was an insufficient security for the sum of \$30,000, and not that it was not in that class of securities known as “trust securities”, or securities authorized by law upon which trust moneys might be advanced.

The plaintiff's pleadings do not present the issues in as clear or comprehensive a manner as they might have been defined. If, as was argued on behalf of the plaintiff, the main issue in this action is the question of a breach of trust based upon the

contention that the mortgage for \$30,000 was, because of the insufficient value of the mortgaged property and the lack of sufficient revenue therefrom at the time this mortgage was allotted to the fund on the 16th December, 1929, not a proper trust security and as the further alleged violation of the defendants' duties as trustees is that they did not set up the trust fund in its entirety within a short period after the testator's death, I am of the opinion that such claims were barred when action was instituted on the 19th March, 1937, by sec. 46 of the Statute of Limitations.

The fact that sec. 1, subsec. 3, and sec. 8, subsecs. 1 and 2, of The Trustee Act (1888), (Imperial), are in the same language as subsecs. 1, 2 and 3 of sec. 46 of our Statute of Limitations as it appears in the Revised Statutes of 1927, lends the assistance of the English authorities to the consideration of this question.

The plaintiff contends that the defendants must be considered, for the purposes of this action, as trustees, not under the will, but as trustees of the fund to be set up for the benefit of the plaintiff. But the alleged breaches of trust are not in respect to the administration of the trust fund after it was in part or wholly set up, but they are that the defendants failed in their duty in not properly establishing the trust fund as directed by the testator's will. Such alleged breaches of trust would, therefore, be a failure to perform duties expressly cast upon them by the will itself and as express trustees under the will, and not breaches of a duty by the defendants in another and separate capacity which they might hold as trustees of the particular trust fund. The plaintiff is also in possession.

The claim of the plaintiff that the mortgage, although an insufficient security for \$30,000, was, nevertheless, allocated to the trust fund in breach of trust, and the claim that in violation of trust the whole sum of \$100,000 was not allocated to the fund upon the testator's death, do not fall within the exceptions set out in sec. 46(2) of the Statute, as they do not savour of fraud in any respect, nor is fraud proved, neither is it either a claim to recover trust property retained by the trustees, or received by the trustees and converted to their own use.

Although the plaintiff claims that the defendants, in breach of their duty as trustees, did not complete the trust fund in question upon the death of the testator, the evidence shows that

the defendants did complete the whole of this fund in the year 1936. No question can, therefore, arise as to the defendants retaining part of the estate in so far as this fund is concerned. The exception to the protection given to trustees by sec. 46 of the statute, is confined to cases in which the trustee, at the date of the issue of the writ, has trust property or the proceeds thereof in his hands or under his control: *How v. Earl Winterton*, [1896] 2 Ch. 626; *Thorne v. Heard & Marsh*, [1895] A.C. 495.

I think, from the fact that the decision in *How v. Earl Winterton* in the Court of Appeal is cited so frequently in judgments in actions where breach of trust is alleged and sec. 8 of The Trustee Act (1888) is invoked as a defence, it may be considered one of the leading cases, if not the leading case, on the interpretation of that section. The head note in the report of this appeal reads:

"The effect of sec. 8 of The Trustee Act (1888) is that except in the three following cases, fraud by the trustee, retention of trust property by him, or receipt by him and conversion of it to his own use, a trustee who has committed a breach of trust is entitled to the protection of the several Statutes of Limitation as if actions or proceedings for breaches of trust were enumerated in them".

Lindley L.J. at p. 640, said:

"Section 8 is cumbrously worded, and it is difficult to grasp the idea which underlies it; but the short effect of sec. 8 appears to me to be that, except in three specified cases (namely, fraud, retention by a trustee of trust money when action is commenced against him, and conversion of trust money to his own use), a trustee who has committed a breach of trust is entitled to the protection of the several Statutes of Limitation as if actions and suits for breaches of trust were enumerated in them".

In *In re Oliver, Theobald v. Oliver*, [1927] 2 Ch. 323, a sum of £2,000 was not set aside for the purposes of a trust as directed by the will of the testator. The plaintiff claimed that certain assets of the estate had been wrongfully expended and the action was for breach of trust in misapplying such assets. It was held that the action was one against the trustee holding under the will in question on express trust assets of the estate for the purpose of the trust, and that as more than six years had elapsed since the cause of action arose, the action was barred.

In re Bowden (1890), 45 Ch. D. 444; *In re Page*, [1893] 1 Ch. 304; *In re Dive*, [1909] 1 Ch. 328, and *In re Blow*, [1914] 1 Ch. 233, are further decisions in which the same rule was applied.

The effect of the provisions of the section in question of the Statute of Limitations has been considered in our own Court of Appeal in the cases of *Lees v. Morgan* (1917), 40 O.L.R. 233; and *Taylor v. Davies* (1917), 41 O.L.R. 403. In the former appeal Ferguson J.A., said at page 238:

“Where no fraud is alleged or proved, and it is not asserted or proven that the defendant has retained or converted to his own use any of the trust property, then I think he is entitled to have the benefit of his plea of the Statute of Limitations, R.S.O. 1914, ch. 75, sec. 47.”

In *Taylor v. Davies* (*supra*), Meredith C.J.O., at page 429, referred to the effect of sec. 47(2) of the Statute of Limitations, R.S.O. 1914, ch. 75, which is in the same language as sec. 46 of the 1927 statutes, and said:

“The object of the enactment was to extend and not to lessen the protection afforded to trustees by the existing law; and, with that object in view, the period of limitation is cut down to six years save in the excepted cases mentioned in the earlier part of subsec. 2, and in these excepted cases the existing provisions as to limitation of actions are left as they were.”

If the element of fraud had entered into the dispute between the plaintiff and the defendants, the section of the statute under discussion could not be invoked by the defendants; and in any event a bar to the right of action in cases of fraud can run only from the discovery of the fraud, or when it might, with reasonable diligence, have been discovered, but ignorance of a right of action does not prevent the time from running in favour of a trustee under sec. 46 of the statute from the date of the breach of trust, where the breach of trust does not fall within the exceptions mentioned.

It is here alleged and argued on behalf of the plaintiff that the breaches of trust occurred when the trustees allocated the mortgage in question to the plaintiff's trust fund in the year 1929.

20 Halsbury, 2nd ed., p. 751, states the rule to be as follows:

“In cases within the above provisions time runs from the date of the breach of trust, not from the time when the loss occurred

to the *cestui que trust*, but does not begin to run against a beneficiary unless the interest of such beneficiary is an interest in possession."

In *Somerset, Somerset v. Earl Poulett*, [1894] 1 Ch. 231, in the Court of Appeal, it was held that the right of action against the trustees was barred by the statute after six years from the time the mortgage investment complained of was made by the trustees. A. L. Smith L.J. at page 268, said: "The cause of action was completed when the defendants committed the breach of trust."

In *Clark v. Bellamy* (1900), 27 O.A.R. 435, it was argued that the plaintiff's want of knowledge of the breach of trust until within six years excluded the bar of the Statute of Limitations, but it was stated by MacLennan J.A., at p. 438: "The statute has not qualified the limitation of such an action by want of knowledge."

The same rule is applied in *In re Fountain*, [1909] 2 Ch. 382, where it was stated that time runs from the date of the alleged breach of trust and not from the date that knowledge of such breach comes to the ears of the beneficiary of a trust fund.

More than seven years elapsed, in the period from December 1929, the time when the plaintiff claims the defendants acted in violation of the trust, until the issue of the writ in this action on the 19th March, 1937.

In my opinion the facts and circumstances present in the case at bar are such that the defendants, as trustees, are protected from liability by sec. 46 of the Statute of Limitations in respect to the breaches of trust they are alleged to have committed with reference to the trust fund in question.

Although I have come to the conclusion that the claims of the plaintiff based upon the said alleged breaches of trust by the defendant should be disallowed, for the reasons given, I am of the opinion that the other defences presented in the action should be dealt with.

The defendants say that the plaintiff is barred under sec. 65 of The Surrogate Courts Act, R.S.O. 1927, ch. 94, by the order made by the Surrogate Court Judge in the year 1932, on the passing of accounts of the estate, from now taking the position that the mortgage for \$30,000 was not a good or sufficient security to be placed in her trust fund. This section of the

statute provides that where the Judge has approved of the accounts filed by an executor or trustee under a will, such approval shall be binding upon any person notified of the proceedings, if the executor subsequently is required to pass his accounts in the Supreme Court. The accounts of the estate of the late Mr. Thompson which were first passed in 1932, set out that the \$30,000 mortgage was included in the trust fund, and the plaintiff was represented upon the audit of the accounts. Subsection 3 of sec. 65 states the powers and jurisdiction of a Surrogate Court Judge on the passing of accounts. He has the power that a Master has under an administration order: *Re Reid* (1921), 50 O.L.R. 595. Rule 611 of The Rules of Practice, sets out the powers of a master upon such a reference and I do not think that the Master could determine whether or not trustees under a will had been guilty of a breach of trust where they are charged with having dealt with a security improperly. The Surrogate Courts Act does not therefore bar the plaintiff's claim of breach of trust on the part of the defendants. The fact, however, that no objection was made to the mortgage security upon the passing of accounts, is evidence that the plaintiff was satisfied with it when the accounts were passed in 1932.

By virtue of sec. 34 of the Trustee Act, the Court may relieve a trustee from liability whether he is, or may be, personally liable for a breach of trust, where such trustee, in the words of the statute, "has acted honestly and reasonably and ought fairly to be excused from the breach of trust."

The three conditions must be present: the trustee must have acted honestly; he must also have acted reasonably; and thirdly, he ought fairly to be excused for the alleged breach of trust. The onus is upon the trustee to establish that he has acted honestly and reasonably.

The standard of care required on the part of a trustee has been discussed and defined in very many judicial decisions. I think that it cannot be put more aptly than in the words of Boyd C. in *Smith v. Mason* (1901), 1 O.L.R. 594, and by Middleton J.A. in *Davies v. Nelson* (1927), 61 O.L.R. 457.

The late Chancellor, in *Smith v. Mason*, said at page 596:

"The general rules of evidence are that mere personal belief or opinion is not evidence, and that the test of reasonableness, as of diligence, is that exhibited by the ordinary businessman,

or the man of ordinary sense, knowledge and prudence in the conduct of his own affairs”

“The nearest approach to a working rule is found in the judgment of Lopes L.J. in *In re Chapman, Cocks v. Chapman*, [1896] 2 Ch. 763, at p. 777, where he says: ‘It is very easy to be wise after the event; but in order to exercise a fair judgment with regard to conduct of trustees at a particular time, we must place ourselves in the position they occupied at that time, and determine for ourselves what, *having regard to the opinion prevalent at that time*, would have been considered the prudent course for them to have adopted.’ ”

In *Davies v. Nelson Middleton* J.A. expressed the same view in this language:

“A trustee is not called upon to be omniscient. All that he is called upon to do is honestly to exercise his best judgment, to take the same care of the property as he would have taken if it had been his own.”

One must approach this question, however, upon the basis that it is impossible to lay down general rules which will be absolute, and each case must depend on its own circumstances.

In *In re Turner, Barker v. Ivimey*, [1897] 1 Ch. 536, it was said that the power to relieve a trustee from personal liability for a breach of trust given by the statute, is meant to be acted upon freely and fairly in the exercise of judicial discretion, and in *Weir v. Jackson* (1905), 5 O.W.R. 281, in a Divisional Court, the opinion was expressed that the Statute ought to be very liberally applied for the purpose of relieving an executor or other trustee who has acted in good faith and reasonably.

There is a further circumstance present in connection with the subject now under consideration, namely, that the defendants as trustees did not bring the mortgage in question into existence. They did not advance the \$30,000 upon the security which is attacked by the plaintiff, but the mortgage was an investment of the deceased. This fact would seem to have its effect upon the application of the principle under discussion as may be observed by consideration of the judgment in *In re Chapman, Cocks v. Chapman*, before mentioned. In this case part of the testator’s estate consisted of certain mortgages of real estate. The trustees had to consider, not whether they should invest money on a particular security, but whether they

ought to get rid of a security of a kind upon which they were authorized to invest money.

Lindley L.J. said, at page 773, that these two considerations are by no means practically the same. This learned Lord Justice used the following words in the course of his judgment. He said at page 776:

“There is no rule of law which compels the Court to hold that an honest trustee is liable to make good loss sustained by retaining an authorized security in a falling market, if he did so honestly and prudently, in the belief that it was the best course to take in the interest of all parties.”

Lopes L.J. in the same case, at page 778, made the following statement:

“A trustee who is honest and reasonably competent is not to be held responsible for a mere error in judgment when the question which he has to consider is whether a security of a class authorized, but depreciated in value, should be retained or realized, provided he acts with reasonable care, prudence, and circumspection.”

And Rigby L.J. said at page 782:

“The case is, however, entirely different when you have to deal with securities already existing at the testator's death.”

In the old case of *Dorchester v. Effingham* (1829), TamL. 279, 31 Revised R. 97, referred to in *Trost v. Cook* (1920), 48 O.L.R. 278, the Court went so far as to say that no blame could be attached to the executors in trusting the persons in whom the testator has confidence.

The defendants have drawn attention to the power given by the will that the executors and trustees may retain any of the testator's investments, and that they shall not be responsible for loss caused by their holding any of such investments. This provision is wide in extent, but where a trust, as in the present case, is coupled with a discretionary power, such discretion to retain investments is to be exercised in a proper manner and within a reasonable time.

In the case of *Re Cawthrope* (1914), 6 O.W.N. 716, Meredith C.J.C.P. referred to the judgment of Jessel M.R. in *Tempest v. Lord Camoys* (1882), 21 Ch. D. 571, where the law on this point was stated.

Williams on Executors, 12th ed., at page 1186, expresses the opinion that executors are chargeable with neglect in allowing part of the assets of an estate to remain outstanding in improper investments, notwithstanding a clause in the will indemnifying the executors against loss.

The judgment in *Re Godwin* (1918), 87 L.J. Ch. 645, is cited as authority. In that case the trust settlement contained a clause that the trustees should not be liable for loss in connection with certain matters in carrying out the trust. The Court, however, in an action for breach of trust dealt with the issue without reference to the indemnity clause in the trust instrument and held the trustees liable respecting certain of their acts as trustees.

I cannot come to the conclusion that the defendant trust company did not act honestly nor reasonably under the circumstances in allowing their co-trustees a period of some months after Mr. Thompson's death to attempt to obtain sufficient funds to pay the liabilities of the estate and to establish fully the fund for the plaintiff's benefit, nor that the Thompson brothers acted wrongfully in presenting such request. When Mr. Thompson died in 1929, the Dominion Automobile Company was a flourishing and prosperous business and one, which I think it was reasonable on the part of all of the defendants to conclude, should be preserved intact, if possible, for the residuary legatees. Shares of this company could possibly have been sold for a sufficient amount to complete the trust fund if the trustees had agreed upon this course, or the company could have been wound up and its assets sold, but at that time there were the further assets of the estate consisting of the mining and distillery companies' shares which were also available for the purpose of the trust. It is true that the first obligation upon the trustees was to establish the trust fund, but can it be said it was a dishonest or unreasonable position to take in postponing the allotment of the balance of \$40,000 to this fund for a short period in order that the plaintiff's brothers might have an opportunity of protecting the whole of the residuary estate, and especially the business which their father had built up? In so far as the defendant Trust Company is concerned, I cannot hold that their action was dishonest or unreasonable. When they learned in 1930 that the Thompson brothers could not raise funds to take over the

residue of the estate, and when the Thompson brothers would not agree to allow the assets of the estate to be sold, the Trust Company then endeavoured to arrange a satisfactory settlement of the whole matter with all the interested parties.

With respect to the attitude taken by the Thompson brothers, it is apparent that by the time they found they could not purchase the residue of the estate the value of securities of every nature and kind had fallen or were falling. It is contended that they should not have dissipated the valuable asset of the estate in the form of the Dominion Automobile Company's shares by causing that company to undertake the erection of an expensive new building in which to carry on the business of the company, and that by so doing they not only wrecked this business but lost the \$200,000 cash which formed part of the company's assets and which would have helped materially in establishing a substantial value to the company's shares. This money was money of the company and not that of the estate or the trustees: *Woods v. Toronto General Trusts Corpn.* (1921), 20 O.W.N. 431.

I have no hesitation in reaching the conclusion that the Thompson brothers were guilty of a serious error of business foresight and judgment in having the Dominion Automobile Company enter upon a project entailing a very large expenditure at this time. The company had been paying a very large yearly rental for the premises used in the business and it was decided by the Thompson brothers, as directors of the company, and without serious objection on the part of the defendant Trust Company, that land should be purchased and a new building erected at large cost. If men of the business ability of the late Mr. Thompson had continued in the management of the company or if general business conditions had continued favourable, this new venture might have succeeded.

Viewing this matter from the standpoint of the Thompson brothers as trustees, and considering the interpretation placed upon the section of the Trustee Act now under discussion, I cannot hold that the action of the Thompson brothers in causing this new building to be erected, although this venture caused in large part the downfall of the Dominion Automobile Company, and the loss of its assets, and the value of its shares, nor the fact that upon the testator's death and upon a falling market

the Thompson brothers did not proceed with their co-trustees, to dispose of the shares of or to wind up the Dominion Automobile Company, were not honest and were unreasonable in the circumstances.

In so far as the remaining assets of the estate are concerned, consisting of shares in various mining and distillery companies, these shares had sufficient value that, if realized, an amount could be obtained to set up the balance of the plaintiff's trust fund in full. Owing to the general business depression which commenced about the year 1929, these shares diminished in value and at the time of the settlement of the matters in dispute by the agreement of the 7th August, 1931, their value was very considerably less than at the time of the testator's death. On a falling market and in view of the provisions of the will, I do not think it was unreasonable that the trustees should retain these shares and seek to have the difficulties which had arisen settled by agreement.

Turning now to the issue respecting the mortgage for \$30,000 allocated to the plaintiff's trust fund immediately after the testator's death, the evidence shows that the Dominion Automobile Company which owned the mortgaged property, valued this property at that time at \$75,000. The mortgaged property has a frontage of 59 feet 6 inches on Yonge Street. Evidence was submitted that land in the near vicinity of the property included in the mortgage was valued at from \$1,000 to \$1,200 a foot on Yonge Street in the year 1931. The fact that the defendants did not obtain an independent valuation of the mortgaged property before placing the mortgage in the trust fund would not in itself constitute a breach of trust on the part of the defendants: *Khoo Tek Keong v. Ch'ng Joo Tuan Neoh*, [1934] A.C. 529.

In 1930, the year immediately following Mr. Thompson's death, the several premises in the building were rented for the sum of \$4,500 or for \$4,300 if one portion of the building, consisting of a hall, was rented only from the month of March of that year. It is true that not the whole of this sum was paid by the tenants, as the rentals for certain months were in arrears and only \$2,975 was received in that year on account of rent, but the nominal rentals, if received, were of sufficient amount to pay the total outgoings and expenses and the interest on the mortgage.

A second mortgage to the Canadian Bank of Commerce was placed on the Collier Street property in May or June 1931, apparently without the knowledge of the defendant Trust Company, and all interest was paid which became due on the mortgage for \$30,000 allocated to the trust fund, partly by the mortgagors and partly by the second mortgagee, up to and including the year 1933. Since 1936 all interest due under the terms of the \$30,000 mortgage has been paid.

No doubt the Collier Street building became unfit for the purpose for which it had been used and rents declined, but this declining rent was at least due in part to the general depressed condition of real estate in the years following 1929. In December 1929, when the mortgage in question was set aside for the purposes of the plaintiff's trust, the Dominion Automobile Company, which had assumed the mortgage, was in prosperous circumstances, having a large sum in cash in its treasury and the revenues from the mortgaged property had not fallen to the extent they did in succeeding years. I do not think dishonest or unreasonable management on the part of the defendants as trustees can be attributed to them because in the years following the allotting of the mortgage to the trust fund the mortgaged property diminished in value and the amount for which it could be rented became reduced due to various circumstances. The complaint of the plaintiff is that the security was not sufficient when the mortgage was allocated to the trust in December 1929. Upon reviewing the action of the trustees as at that time, I have come to the conclusion that they are entitled to the protection of the statute.

With respect to the allegation of the plaintiff that the defendants were guilty of a breach of trust, in the words of the statement of claim, "in failing to enforce the covenant of the testator for payment of the mortgage moneys in the said mortgage contained for the benefit of the trust fund", it was argued on behalf of the plaintiff that the estate of the late Mr. Thompson was liable upon this covenant given by him as mortgagor to Mrs. Campbell, the mortgagee, contained in the mortgage for \$30,000 which after Mr. Thompson's death was allotted to the plaintiff's trust.

Considering this issue apart from what has already been said as to the effect of the Statute of Limitations upon the alleged

breaches of trust, this mortgage was assigned on the 15th September, 1928, by the mortgagee to the mortgagor, several years after the equity of redemption in the land which comprised the mortgage security had been conveyed by the mortgagor to his company, The Dominion Automobile Company, Limited.

This assignment recites that \$30,000 and interest is due and owing upon the mortgage. The mortgagee in consideration of \$30,221.92, the receipt of which sum is by her acknowledged, assigns and sets over to the assignee and his executors, administrators and assigns the mortgage and the said sum of \$30,000 and interest and "the full benefit of all powers and of all covenants and provisoes contained in the said mortgage . . . to have and to hold the said mortgage and all moneys arising in respect of the same"

The mortgagee also conveyed her interest in the land in question to the mortgagor.

This indenture of assignment consists of an absolute transfer of the debt and the security for the amount of the said debt. The right to sue upon the covenant would arise when the covenantor became in default according to the terms of the covenant. But the debt, or the right of action which arose from the breach of the covenant for payment, was discharged by payment when such was accepted by the mortgagee. The late Mr. Thompson, as the assignment of the mortgage sets out, paid to the mortgagee, the full amount owing and due by him under his covenant to pay to her the amount he owed her and he obtained the acknowledgment of the mortgagee that she had received the money. At that time all liability of the late Mr. Thompson upon this covenant was extinguished, but the mortgage remained in full force and effect in his hands as against the holder of the equity of redemption.

The claim made by the plaintiff is not against the trustees for failure to compel the Dominion Automobile Company, Limited to pay the mortgage money. The claim is based upon the alleged failure by the defendants, as trustees, whether of the estate of the late Mr. Thompson or, as was argued, as trustees of the fund to be set up for the plaintiff, to pay into the plaintiff's trust fund the amount secured by the mortgage, in satisfaction of the covenant of the testator contained in the said mortgage. When the late Mr. Thompson paid to Mrs. Campbell the money

owing and due by him under his covenant, he had satisfied his debt in full and neither he nor his estate were thereafter liable.

Section 5 of The Conveyancing and Law of Property Act, R.S.O. 1927, ch. 137, reads:

“A receipt for consideration money or securities in the body of any conveyance shall be a sufficient discharge to the person paying or delivering the same without any further receipt being indorsed on the conveyance.”

I have now to consider the claim of the plaintiff that the agreement of the 7th August, 1931, by which the whole of the matters in dispute between the plaintiff and the defendants were to be settled should be declared to be of no effect for the reason that she did not have independent advice and was not aware when she executed the agreement of the state or condition of the security for the mortgage of \$30,000 allocated to her trust fund and approved by the plaintiff under the terms of the agreement as part of this fund.

The defendants in reply say that the plaintiff was well aware of all facts pertaining to the said mortgage prior to the execution of the agreement, and entered into it voluntarily with full knowledge of its effect. The defendants further argue that, with such knowledge, the plaintiff by her conduct acquiesced in, and affirmed, the terms of the agreement, that she has accepted and retained all benefits received by her under it, and, as a result, cannot after a long lapse of time now seek to repudiate it.

The plaintiff stated that she had discussed the several draft agreements which led up to the final agreement of the 7th August, 1931, with the late Mr. Morden of the defendant Trust Company, and also with her husband whom the plaintiff said she consulted in connection with her affairs.

There is no question in my mind, gathered from the plaintiff's own testimony and from the evidence but that the plaintiff's husband was fully acquainted with all matters pertaining to the plaintiff's position under the will of her father, and that he advised her in connection with this agreement.

The agreement, although dated the 7th August, was not executed until the 17th August. The plaintiff said that she and her brothers met in the office of Mr. T. J. Agar, K.C., on the day the agreement was signed and that she was there only on that occasion. On the other hand, Mr. Agar said that the

entries in his books show the plaintiff to have been in his office on some five occasions between the 4th and 17th August with reference to the agreement in question, and that on one occasion her husband had had an interview with him in the same connection. I have concluded that the plaintiff is mistaken in her recollection that she was in Mr. Agar's office on only one occasion and that her memory is again at fault as it was proved to be in respect to her knowledge of the erection of the new building by the Dominion Automobile Company, Limited, which has already been referred to. I cannot conceive that Mr. Agar's books would show, as they do, that the plaintiff had been present in his office when the agreement was the subject of discussion on some five occasions, unless such were the fact.

Mr. Agar said that he did not consider he was acting in the matter for the plaintiff but was acting primarily for her brothers in an attempt to have the whole matter in dispute finally settled. He also testified that the plaintiff had told him that she desired to have the mortgage on the Collier Street property as one of the assets which would make up the trust fund. The plaintiff considered that Mr. Agar was acting on her behalf as well as on behalf of her brothers.

On the 12th September, 1931, less than a month after the execution of the agreement, the defendant Trust Company wrote to the plaintiff giving her a report they had received showing the exact condition of the Collier Street property, the security for the \$30,000 mortgage, and showing that owing to the low revenues as compared with the expenses, it might be advisable to remove the buildings from the land. The plaintiff would not consent to this proposal.

The first communication in evidence which intimates that the plaintiff was not satisfied with the agreement she had executed, is a letter of the 29th November, 1932, from the plaintiff's solicitors to the defendant Trust Company. The complaint was made that the plaintiff's trust fund had not been set up and that the agreement in question was wholly in the interests of the defendant Trust Company. There is no mention however, in this letter, of the mortgage for \$30,000, nor any allegation that it was an improper security to have been placed in the trust fund. It was not until the 8th March, 1935, that the same solicitors wrote the defendant Trust Company that the plaintiff

would not place herself in the position of accepting the mortgage in question as a proper trust investment. I cannot find any communication before this latter date by which the defendants were advised that the plaintiff considered the mortgage was not a good or sufficient security, although three and one-half years earlier she had been made fully aware of the condition of the mortgaged premises by the letter of the 12th September, 1931, to which I have referred.

The letter of the plaintiff to the Canadian Bank of Commerce of the 17th August, 1931, the day upon which the agreement under discussion was finally completed, in which she states her understanding to be that the bank are "Official Custodians" of the Dominion Automobile Company, suggests that the plaintiff on the very day she signed the agreement, had some reason to think that that company, which was liable for the principal secured by the mortgage, was in financial difficulties.

In November 1932, the accounts of the estate were passed by His Honour Judge Morson. These accounts had first been furnished to the plaintiff and had been inquired into by her husband on her behalf. The plaintiff was represented on the passing of the accounts by her solicitors and her husband. The fact that the mortgage for \$30,000 was part of the plaintiff's trust fund is set out in these accounts. Although the representative for the defendant Trust Company upon the audit of the accounts, requested the plaintiff to state any objection which she might have to them, or to the administration of the estate, and although certain objections were made as set out in the order on passing of the accounts, no objection was taken to the mortgage in question and no appeal was taken from the order.

The accounts of the estate were again passed before His Honour Judge Jackson on the 5th and 22nd March, 1937. No objection was taken to the accounts or securities on this occasion, but this may have been due to the fact that on the 19th March, 1937, this present action was commenced.

Under the terms of the agreement the plaintiff was to receive for four years from the 18th July, 1930, the full net revenue of all securities in the trust fund until the full sum of \$100,000 was established in that fund, and also interest at five per cent. per annum on the balance of the fund, and when the fund was established in full, she was to receive the full net revenue from

the fund for life. The fund was to be completed not later than the end of four years from the above mentioned date. The plaintiff has received in cash from the date of Mr. Thompson's death, to the date of the issue of the writ, and has retained, the sum of \$12,317.58 more than she would have received had only the sum of \$2,500 per annum been paid to her, as provided by her father's will.

On the 4th February, 1936, the plaintiff wrote to the defendant Trust Company stating there was some \$4,000 owing to her in interest from her father's estate and requesting the sum of \$2,000 as a payment on account. At this time, by the terms of the late Mr. Thompson's will, the plaintiff was not entitled to receive interest on the amount of the trust fund, but only the sum of \$2,500 per annum. It is to be concluded from this letter that the plaintiff is referring to interest due to her under the terms of the agreement in dispute in this action.

Courts of Equity have always granted relief in the case of contracts or transactions where an unfair advantage has been taken of a person who, from whatever cause, was subject to the influence of another. Where there is a confidential relationship between the parties as that between trustee and *cestui que trust*, as in the present case, and the transaction is impeached, the burden rests on the defendants to show that the plaintiff had full knowledge of the facts, and further that she had independent advice. If the transaction is manifestly fair, evidence of independent advice may not be necessary: *Wright v. Carter*, [1903] 1 Ch. 27; *Ralston v. Tanner* (1918), 43 O.L.R. 77.

I do not think it can be said that the agreement in question is not manifestly fair to the plaintiff when the terms of the will of the late Mr. Thompson as to the income to be received by the plaintiff are compared with the terms of the agreement with respect to the revenue, which, under it, was to come into the hands of the plaintiff.

I think, however, that the important question which presents itself for determination is not whether the agreement is voidable because made as alleged by the plaintiff, without knowledge of essential facts and without independent advice at the time it was executed, but it is whether the plaintiff by her subsequent acts acquiesced in and affirmed the agreement after she had full knowledge of the facts and of her rights. If a person who alleges

he has been subject to undue influence and has not had independent advice, with respect to an agreement to which he is a party, at the time he placed his signature to such agreement, elects to affirm the transaction after he has obtained full knowledge of the facts of which he complains, the right to repudiate it can no longer be exercised.

In *Scarf v. Jardine* (1882), 7 App. Cas. 345, Lord Blackburn, at page 361, stated the principle to be, that where a person has done an unequivocal act, "I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way, the fact of his having done that unequivocal act to the knowledge of the persons concerned, is an election." Once the election is made, in the words of Lord Blackburn, "it cannot be retracted; it is final and cannot be altered." This principle of election is discussed in the Supreme Court of Canada, in *Manitoba Insurance Company v. Whittle* (1903), 34 S.C.R. 191, at p. 207, in *Continental Casualty Company v. Casey*, [1934] S.C.R. 54, and also in *Hewson v. Macdonald* (1882), 32 U.C.C.P. 407.

If there has been undue delay on the part of a person who may have a right to repudiate an agreement, in bringing action for that purpose, the Court may infer that such person has elected to abide by the terms of the agreement.

In the celebrated case of *Allcard v. Skinner* (1887), 36 Ch. D. 145, which is cited in almost all cases where the question of undue influence arises, it was held that although the plaintiff was the subject of undue influence at the time she made certain gifts, nevertheless she was barred from asserting a claim for restitution because of laches and acquiescence on her part. Bowen L.J. at p. 192, said: "Was she aware of her rights at the time she formed this resolution? In my view I incline to think that she must have been, having regard to the character of the advisers who surrounded her; but I do not consider it to be essential to draw that inference. It is enough if she was aware that she might have rights and deliberately determined not to inquire what they were or to act upon them."

In *Robert v. Montreal Trust Company* (1917), 56 S.C.R. 342, Anglin J. used these words: "The man who has learned facts which entitle him to avoid a contract cannot be allowed to defer indefinitely the exercise of election in which others are interested.

The time must come when he will be taken either to have foregone that right, or to have exercised it in favour of affirming." And at page 360 the same learned Judge said, referring to the case of *Clough v. London and Northwestern Railway Company*, L.R. 7 Ex. 26: "Mere lapse of time may import acquiescence amounting to affirmation. If great, it may, without more, do so conclusively." This question was again considered by the same Court in *Bradley v. Crittenden*, [1932] S.C.R. 552.

Although I might have some hesitation in finding that the plaintiff was not aware of the condition of the mortgaged premises before the execution of the agreement, I do not think it necessary to determine that question in order to dispose of this issue, for the reason that I cannot arrive at any other conclusion but that the plaintiff had full and complete knowledge of the condition and state of the property held as security for the principal sum of \$30,000 by the mortgage in question in September 1931. Five years and six months elapsed from that date before this action was instituted.

The plaintiff's actions, subsequent to the date of the execution of the agreement by her, which I have already related, and the length of time which has elapsed since the plaintiff acquired knowledge of the matters with respect to which she now complains, are sufficient, in my view, to show conclusively that the plaintiff acquiesced in the agreement and its terms and that she elected to abide by the agreement.

Upon applying the principles of law which I have discussed, to the facts and circumstances presented in evidence, I have concluded that the agreement of the 7th August, 1931, must stand.

The claim of the plaintiff that the interests of the defendants, who are the plaintiff's brothers, are in conflict with the interests of the plaintiff, if at any time material, cannot now be upheld.

I cannot conclude that these respective interests conflict, since the date of the agreement between the parties, or in any event, since the plaintiff's trust fund was fully established in 1936.

I may sum up my conclusions as follows:

(1) The claim of the plaintiff charging the defendants with breaches of trust is barred by the Statute of Limitations.

(2) The estate of the late A. M. Thompson is not liable upon the covenant to pay contained in the mortgage for \$30,000.

(3) The agreement of the 7th August, 1931, is valid and binding upon the plaintiff.

(4) The interests of the defendants, the Thompson brothers, at the date of the commencement of the action were not in conflict with the interests of the plaintiff.

The action is dismissed with costs.

The plaintiff appealed to the Court of Appeal from the judgment of Hogg J.

March 26th, 27th, 28th and 29th. The appeal was heard by ROBERTSON C.J.O., FISHER and MCTAGUE JJ.A.

R. L. Kellock, K.C., and *J. E. Tansey*, for the plaintiff, appellant, contended that the judgment of the trial Judge should be reversed and the agreement between the parties of August 7th, 1931, set aside and the mortgage of \$30,000 declared to have never been a fit trust security, and the trustees as such, and in their personal capacity, liable to replace this mortgage with a sufficient security.

Counsel contended that in order to salvage as much as possible for the Thompson brothers, the residuary legatees who are two of the trustees defendants to this action, the said residuary legatees arranged with the corporate trustee to set aside only \$60,000 out of the \$100,000. This \$60,000 included the improper mortgage for \$30,000. They were to complete this fund but they had not assets to do so to the knowledge of the Trust Company. The will clearly directed that this fund should be set up in toto immediately. Thus the defendants allowed their interest to conflict with their duty to the detriment of the plaintiff. The plaintiff pressed the defendants to complete the fund. Finally a settlement was arrived at by the agreement of August 7th, 1931, between the parties hereto.

These circumstances alone place a heavy onus on the defendants to show that the mortgage was a proper security for the \$30,000 which it purported to secure. The evidence is that the mortgaged premises would barely pay the interest even if all rentals were collected in full, and no allowance was made for depreciation of the building which was very old. No valuation was obtained of these premises which were situated in a district

which was depreciating. These facts clearly indicate that this mortgage was a grossly improper trust investment.

Counsel submitted that the plaintiff should not be bound by the agreement she entered into on August 7th, 1931, with the defendants. This agreement purported to confirm the items composing the \$60,000 fund set aside and the plaintiff was to accept this lesser amount temporarily in exchange for certain benefits to the plaintiff. The plaintiff was never cognizant of essential information about the mortgage and the arrangement made between themselves by the defendants. The plaintiff did not have independent advice and she did not properly understand this agreement and its effect.

The plaintiff's lack of knowledge of all the essential facts prevents the defendants setting up acquiescence on her part to the terms of their agreement.

Counsel also argued that the trial Judge should have held that sec. 46 of The Limitations Act, R.S.O. 1937, ch. 118, does not apply to this case. This section only applies to a personal claim against trustees where they no longer have assets of the estate in their hands.

In any event as to the capital of the fund, with which this action is concerned, time does not run against the plaintiff as she is not in possession, having only a contingent interest, and accordingly even as against the defendants personally the action is not barred: North J. in *Mara v. Browne*, [1895] 2 Ch. 69. Reference also to *In re Fountaine*, [1909] 2 Ch. 382, 392.

It is further submitted that the 1931 agreement is not a bar to the action and should be set aside. It was entered into by the plaintiff without knowledge of the facts, without independent advice, and as it attempts to obtain a release for the breach of trust in placing the mortgage in the trust fund in 1929, it is of no avail as it does not recite the fact of the breach of trust.

Underhill, 9th ed., page 534; Lewin, 13th ed., page 980; *Re Brookes*, [1914] 1 Ch. 558; *Ames v. Parkinson*, 7 Beav. 379; *Lloyd v. Atwood*, 3 DeG. & J. 614, at 649-651; *Williams v. Scott*, [1900] A.C. 499, at 504 and 508.

The standard of care required of trustees was not met in the case at bar: *Davies v. Nelson* (1927), 61 O.L.R. 457.

In the circumstances of this case it is submitted the right of action is not affected by laches or acquiescence. The plaintiff did not know the full facts until ascertained after action brought,

and the estate has not been distributed: Lewin, 13th ed., pages 900-901 and 888; *Rouchefoucauld v. Boustead*, [1897] 1 Ch. 196.

It is further submitted in any event that the plaintiff is entitled to have the testator's covenant in the mortgage in question enforced against his estate. As long as the mortgage was held by the mortgagor himself or by his executors it could not be enforced because a person cannot sue himself, but when the mortgage was transferred from the defendants as executors to the defendants as trustees for the plaintiff then it could and should have been enforced: Reference to 41 Corpus Juris 688; 675; *McLellan v. Maitland*, 3 Gr. 164; *Canadian General v. George* (1918), 42 O.L.R. 560; *Neveren v. Wright* (1917), 39 O.L.R. 397.

There is in any event an implied promise to pay which arises on the transfer of the mortgage from the testator's estate to the trustees of the trust fund: *Sutton v. Sutton* (1882), 22 Ch. D. 511, at 515.

D. L. McCarthy, K.C., and *K. G. Morden*, for the defendant Trust Company, respondent, submitted that there is ample evidence to support the findings of the trial Judge that the plaintiff had acquiesced in the 1931 agreement, had elected to take benefits under it and further that the parties could not be restored to the position before this agreement was executed.

Counsel pointed out that the proper standard of care for trustees is that trustees ought to conduct the business of the trust in the same manner that an ordinary prudent man would conduct his own business: *Whiteley v. Learoyd* (1886), 33 Ch. D. 347; *Davies v. Nelson* (1927), 61 O.L.R. 457, at 463-4; *Re Bangham*, [1933] O.W.N. 401.

The mortgage here in question was in sound condition at the time it was allocated to the plaintiff's trust fund. In addition the mortgagor's covenant was then sufficient security in itself. It is not necessary to have a valuation report at the time the mortgage was allocated: The Trustee Act, R.S.O. 1937, ch. 165, secs. 26(1), 29, 30, 31; *Re Chapman*, [1896] 2 Ch. 763, at 772.

This plaintiff knew in 1929 that this mortgage was part of her trust fund. At all relevant times she was aware of its condition but it was not until November, 1932, that her solicitors questioned its validity.

Counsel argued that separate legal advice was not necessary because the 1931 agreement was a "family arrangement" as it

claimed to be in one of its recitals: *Hotchkiss v. Bligh*, (1820) 1 Bli. 303; *Jenner v. Jenner* (1860), 2 DeG. F. & J. 359; *Bentley v. MacKay* (1862), 4 DeG. F. & J. 279; *Cashin v. Cashin*, [1938] 1 All E.R. 536.

Counsel submitted that the plaintiff had been guilty of laches and acquiescence. It has been held that acquiescence is a complete answer to such a claim as that of the plaintiff here: *Brighthouse v. Morton*, [1929] S.C.R. 512, at 527; *Lamb v. Franklin* (1910), 1 O.W.N. 1010.

This defendant has been prejudiced by the plaintiff's delay in instituting this action. W. S. Morden, the official of the defendant company who looked after this estate, died on January 28th, 1937. This unfortunate occurrence has seriously handicapped the defence of this action. The plaintiff's action should fail for this reason alone: *Brunyate, Limitations of Actions in Equity*, p. 244.

The only allegation of breach of trust is the allocation of the mortgage to the plaintiff's trust fund in December, 1929. The writ of summons was not issued until March 19th, 1937. It is submitted in addition to the other defences that, if this allocation was a breach of trust, the plaintiff's claim is barred by the Limitations Act, R.S.O. 1937, ch. 118, sec. 46, which confers the benefit of the six years limitation period on trustees where there is no fraud connected with the breach of trust. Fraud is not even pleaded by plaintiff in this case: *Taylor v. Davies* (1917), 41 O.L.R. 413, at 429; *Lees v. Morgan* (1917), 40 O.L.R. 233; *Perdue v. Perdue* (1928), 34 O.W.N. 172; *Re Bowden*, 45 Ch. D. 444; *Re Somerset*, [1894] 1 Ch. 231, at 245, 263, 266-269; *Re Blow*, [1914] 1 Ch. 233, at 241-2; *How v. Winterton*, [1896] 2 Ch. 626.

The Honourable F. J. Hughes, K.C., for the defendants, Harry A. Thompson and Stanley A. Thompson, respondents, adopted the argument of counsel for the Trust Company and added the following contentions.

The plaintiff has acquiesced in the 1931 agreement and has accepted and retained benefits thereunder after full knowledge of all the circumstances. Consequently the plaintiff must be held to have elected to be bound by its terms.

The plaintiff received more money under the terms of the 1931 agreement than she would have received if the terms of the will had been strictly adhered to by the trustees. The

plaintiff had a long time to consider the agreement and entered into it voluntarily, and hence she should be bound by it even if she did not have independent advice: Reference to *Wright v. Carter*, [1903] 1 Ch. 27; *Ralston v. Tanner*, 43 O.L.R. 77; *Cashin v. Cashin*, [1938] 1 All E.R. 536.

The plaintiff has never offered to return the benefits received under the 1931 agreement hence there can be no question of rescission of this agreement: Reference to *Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317; *Bank of Montreal v. Guaranty Silk*, [1935] O.R. 493, at 518; *Dominion Royalty v. Goffatt*, [1935] O.R. at 188, and [1935] S.C.R. 565.

Cur. adv. vult.

April 30th, 1940. FISHER, J.A.:—I am in full accord with the reasoning and conclusion of my brother McTague that this action is barred by the Statute of Limitations.

I desire to add that I am of opinion, even if the Statute of Limitations is not a bar, that the agreement of the 7th August, 1931, is. As all the relevant facts connected with the protracted negotiations leading up to the execution of the agreement are set out with perfect precision by the learned trial Judge they need not be repeated.

The plaintiff's contentions are that she did not understand the agreement and had no independent advice.

I have since the argument read with care the evidence, oral and documentary, and am convinced that the plaintiff, during the protracted negotiations leading up to the execution of the agreement, was fully aware of the reasons giving rise to it, and also to what was fully and clearly agreed upon. The plaintiff is an educated woman, her correspondence indicates that she has business capacity, and during the negotiations was in close contact with her husband, an experienced business man. The evidence to my mind is clear, that the plaintiff not only approved of the set-up of the \$60,000 trust fund, which at that time included the \$30,000 mortgage, but has since August, 1931, to March, 1935, received and accepted income and cash thereunder far in excess of what she would have been otherwise entitled to. I entirely agree with the learned trial Judge that the plaintiff approved the agreement, acquiesced in its terms and elected to be bound by it, and it is therefore binding upon her.

I would dismiss the appeal with costs.

MCTAGUE, J.A.:—The plaintiff, a daughter of the late Alexander Montgomery Thompson, who died on the 18th day of October, 1929, brings this action against the defendants as trustees under the will of the deceased for breach of trust.

Under the will the trustees were directed to set apart for the benefit of the plaintiff the sum of \$100,000, to keep the same invested in good legal securities, and to pay the plaintiff out of the derived income the sum of \$2,500 yearly for ten years after the death of the testator. After the expiration of the ten-year period she was to receive the full income from the fund for the balance of her natural life. If her husband predeceased her, she became entitled to the corpus of the fund, and if she predeceased her husband the corpus was to go to the residuary fund under the will.

Mr. Thompson died just after the beginning of the financial depression of 1929. The main asset of the estate consisted of shares in the Dominion Automobile Company Limited, at the time a very prosperous business in healthy financial condition. Besides this there was in the estate considerable cash and shares in mining and distillery companies. Between the date of the testator's death and the grant of probate on December 4th, 1929, these latter shares had declined drastically in market value and continued to decline for some time after. The trustees were unwilling to sell the shares at what was considered a great sacrifice. However, shortly after the grant of probate, I think about the 12th December, 1929, the trustees set aside part of the trust fund, amounting to \$60,000 in the form of a bond amounting to \$1,000, cash \$29,000 and a mortgage for \$30,000 held by the testator on certain Yonge Street property belonging to the Dominion Automobile Company Limited.

From time to time after this the plaintiff kept pressing the defendants, particularly the Trust Company, to complete the trust and bring it up to the full amount of \$100,000. Finally, an agreement between the plaintiff and the defendants was entered into, dated the 7th day of August, 1931, postponing the time for completion of the trust fund, in consideration of the plaintiff receiving certain immediate benefits by way of income greater than what she was entitled to at the time under the will itself. The agreement contained a clause by which the plaintiff

approved of the securities then in the trust and agreed that they should be considered as in accord with the terms of the will. In 1936 the plaintiff's trust fund was completed to the sum of \$100,000.

The plaintiff's action is based upon the contention that the mortgage for \$30,000 included in the fund is not and never was a proper trust security, and that the trustees, as such, and in their personal capacities as well, are liable to replace the mortgage with proper trust securities.

The action was tried by the Honourable Mr. Justice Hogg. By his judgment dated 4th December, 1939, the action was dismissed. From that judgment the plaintiff is appealing.

In lengthy reasons for judgment the learned trial Judge thought that the action had to be dismissed on several grounds. He thought it was barred by the Statute of Limitations, R.S.O. 1937, ch. 118, sec. 46. In the circumstances of the case he thought the trustees should be relieved from any personal liability under the Trustee Act, R.S.O. 1937, ch. 165, sec. 34, apparently considering that if there was a breach of trust it was a technical breach only. He refused to set aside the agreement dated 7th August, 1931, on the ground that the plaintiff had acquiesced in it, and had elected to take the benefits under it, and the parties could not be restored to the position they were in before the agreement was signed.

In the view I take of the matter it is unnecessary to go into detail or deal with the defences other than that of the Statute of Limitations, sec. 46. Under that section a trustee is entitled to the benefit of a six year limitation period except in cases where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee is party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his use. In this case the breach of trust, if there was one, took place about the 12th December, 1929. The writ was not issued until the 19th March, 1937, well over the six year period. There is no allegation of fraud or fraudulent breach of trust. The claim is not one to recover trust property or the proceeds thereof retained by the trustees, because as trustees for the plaintiff they have completed the fund and have retained nothing from it. It may be a case of improperly constituting the fund, but it is

not a case of retention. Neither is it alleged that they have converted to their own use any property received by them as trustees. The general effect and interpretation of the section, which is in the same language as the corresponding one in the Imperial Act of 1888, is discussed in many English and Ontario cases: *How v. Winterton*, [1896] 2 Ch. 626; *Thorne v. Heard and Marsh*, [1895] A.C. 495; *In re Oliver, Theobald and Oliver*, [1927] 2 Ch. 323; *Lees v. Morgan* (1916), 40 O.L.R. 233; *Taylor v. Davies* (1917), 41 O.L.R. 403, [1920] A.C. 636.

But there is another exception contained in subsec. 2(b) of sec. 46 whereby it is provided that the statute "shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession." There is no question that the plaintiff is a beneficiary in possession so far as the life interest goes. In accordance with the terms of the will she has been in receipt of the income from the beginning.

But Mr. Kellock argues that in addition she has a contingent interest in the capital which she is to receive in toto in the event her husband predeceases her, and as to that she is a beneficiary not in possession and therefore, in so far as her contingent interest in the capital is concerned, the statute has not yet begun to run against her.

Much the same contention was made in the case of *Mara v. Browne*, [1895] 2 Ch. 69. Although that case may be distinguished from the present on the facts, the argument now put forward by counsel for the appellant was, to a certain extent, given effect to by North J., who tried it. That was a case of a marriage settlement under which money of the wife was vested in trustees upon trust to pay the income to her during the joint lives of herself and her husband for her separate use without power of anticipation, and after her death, in case her husband should survive her, to pay the income to him for life, and after the death of the survivor, to hold the trust funds upon trust for the children of the marriage. It will be observed that there was no provision made in the event of the husband dying first for the disposal of the income during the period that the wife survived him. There were improper investments in 1884. The husband died in 1885, and in November, 1890, more than six years after the breaches of trust complained of, an action was commenced against the solicitor who had been concerned in

making the investments, and his partner, to compel them to make good the loss. Among other defences the Statute of Limitations, in the same terms as that now under consideration, was pleaded. It was held by North J. that upon the death of the husband in 1885 the interest, limited by the settlement for the joint lives of husband and wife, expired, and that the wife thereupon took by way of resulting trust a new estate for her own life. As this new interest had its beginning within the period of six years prior to the commencement of the action, it was held that it was not barred by the statute. It was also held that the wife had a contingent reversionary interest in the capital in the event of her children dying without attaining vested interests and that it was impossible to hold that this interest in capital could be barred also, "for this would be making the statute apply to the interest of a beneficiary which is neither vested nor in possession, but contingent and reversionary only."

In the judgment of North J. in the case of *Mara v. Browne* he lays some emphasis on the fact that the different interests of the wife in income had different origins, the one arising from the marriage settlement and the other by implication of law as a resulting trust. He also pointed out that the income taken by the wife under the marriage settlement was declared to be her separate estate and there was a restraint upon anticipation, while there was nothing of this kind in respect of the income taken by way of resulting trust. There is that distinction between that case and the present, for what it may be worth. One must agree, however, with Mr. Kellock that, notwithstanding any such distinctions, the principle that seems to have been applied by North J. is wide enough to include the present case.

Mara v. Browne is, of course, not binding upon this Court, and the question is whether we should follow it. The judgment of North J. was reversed on appeal on what may be called the merits, the issue being whether a solicitor purporting to act for trustees could himself be liable as a constructive trustee for breach of trust in respect of moneys that passed through his hands: see *Mara v. Browne*, [1896] 1 Ch. 199. The question of the Statute of Limitations was not dealt with on the appeal.

The decision of North J. in *Mara v. Browne* is referred to by several text-writers. In Underhill's *Law of Trusts and Trustees*, 9th ed., p. 521, it is cited as authority for the broad proposition

it lays down, but with a "quaere." In Godefroi on Trusts and Trustees, 5th ed., p. 65, it is cited as authority for the narrower proposition that "it seems that a beneficiary who has been in possession more than six years, but acquires a new title within the six years, is not barred." In Lightwood's Time Limit of Actions, p. 286, it is given as authority for the broad proposition, "a bar to the immediate life interest is not a bar also to any subsequent interest which the tenant for life may have, and as regards such a subsequent interest, the statute does not run until it falls into possession." In Mr. Brunyate's interesting work on Limitation of Actions in Equity at p. 121, the case is referred to, with the comment that "this decision is hardly satisfactory, and since *Mara v. Browne* was reversed by the Court of Appeal on another point, it may not be followed when the point arises again." So far as I know, the case has not been followed in any later case, and I do not think we should accept it as a case of authority, but we must turn to the words of the statute itself to determine their proper application.

If there were no qualifying clause at the end of sec. 46, subsec. 2(b), the statute would run from the time the cause of action arose. It is to be noted that by the terms of the qualifying clause the time when the statute begins to run is delayed only in so far as the beneficiary is concerned. As against anyone else the statute will run from the time when the cause of action arose: see *Re Bowden* (1890), 45 Ch. D. 444; *Re Blow*, [1914] 1 Ch. 233.

Now, it is not open to dispute that appellant had an interest in possession when the alleged breach of trust was committed in December, 1929, and it follows that from that time the statute began to run against her. Counsel for the appellant concedes that this is so in so far as her interest in income is concerned. He argues, however, that appellant's right to sue in respect of her contingent interest in capital is not similarly affected because it is not yet an interest in possession. I think that argument disregards the terms in which the qualifying clause upon which appellant relies is expressed. The clause deals only with time running against the beneficiary, and does not speak of the statute running in respect of his interest or interests. If, therefore, the statute has run against the appellant as a beneficiary with an interest in possession, that interest

being her right to the income, I fail to see anything in the statute that preserves to her the right to sue upon the same cause of action because of her contingent interest in capital. The beneficiary can be barred only once in respect of the same cause of action taken by her directly under the same instrument, and I find nothing in the terms of the qualifying clause to prevent the statute running against her when her cause of action is ripe and she has an interest in possession.

This construction of the statute is, I think, in accordance with its purpose. A beneficiary whose interest in a trust has not become an interest in possession may not be fully awake to the importance of protecting it. The interest may be a contingent one, and there may be little prospect of any benefit from it, so that the beneficiary would not be warranted in commencing litigation to protect it. Considerations of this kind, it may reasonably be assumed, gave rise to the qualifying clause in question. When the beneficiary has, however, an interest in possession, the reason for allowing his delay has ceased to exist. He should be alert then to protect his interest or interests. For the foregoing reasons I am of opinion that the Limitations Act applies and is an answer to this claim.

I have refrained from dealing with the merits of the case. From this it must not be taken that the Court is placing the stamp of approval upon the conduct of the trustees. Neither am I to be taken as holding the learned trial Judge in error in dismissing the action on grounds other than the Statute of Limitations.

In the result the appeal must be dismissed with costs.

ROBERTSON C.J.O. agreed with MCTAGUE J.A.

Appeal dismissed with costs.

[COURT OF APPEAL.]

Re Canadian Mineral Development Co. Ltd. v. Buffalo-Beardmore Gold Mines Ltd.

Division Courts—Jurisdiction—Action to recover debt where amount claimed does not exceed \$400—Interpretation of sec. 54(1) (d) of The Division Courts Act, R.S.O. 1937, ch. 107.

By sec. 54(1) of The Division Courts Act, R.S.O. 1937, ch. 107, the Division Court has jurisdiction in "(d) an action for the recovery of a debt or money demand, where the amount claimed, exclusive of interest, whether the interest is payable by contract or as damages, does not exceed \$400 and the amount claimed is (i) ascertained by the signature of the defendant or of the person whom as executor, or administrator he represents; or (ii) the balance of an amount not exceeding \$400 which amount is so ascertained; or (iii) the balance of an amount so ascertained which did not exceed \$800, and the plaintiff abandons the excess over \$400."

The plaintiff brought this action in a Division Court to recover the sum of \$385.21 upon a promissory note dated March 19th, 1938, for \$500, upon which at the time of action brought there was a credit of \$157.16 and a debit for accrued interest of \$42.37. The defendant contended that the Division Court had no jurisdiction to entertain the action.

Held that under sec. 54(1) (d) (iii) of the Act the Division Court had jurisdiction. Sec. 54(1) (d) (iii) should not be read as implying that there must be an excess over \$400 to be abandoned. If there be no excess over \$400 and the other conditions specified are met, then the Court has jurisdiction.

AN appeal by the defendant from an order of Greene J. dismissing a motion by the defendant for an order prohibiting any proceedings to be taken to enforce a judgment of His Honour Judge Denton, sitting in the First Division Court of the County of York.

May 8th, 1940. The appeal was heard by RIDDELL, FISHER and HENDERSON J.J.A.

R. I. Ferguson, K.C., for the defendant, appellant.

J. P. Manley, K.C., for the plaintiff, respondent.

May 10th, 1940. RIDDELL J.A.:—This case involving the jurisdiction of the Division Court has given me considerable trouble by reason of the wording of the Statute; but after full consideration, I have come to the conclusion that the Division Court had jurisdiction.

The appeal will be dismissed with costs.

HENDERSON J.A.:—An appeal from the order of Greene J. dated March 15th, 1940, dismissing an application for prohibition to the plaintiff and the First Division Court of the County of York, from taking any proceedings to enforce a judgment in

the action of His Honour Judge Denton, Judge of the First Division Court of the County of York, dated the 4th day of February, 1940.

The question raised depends upon the construction of sec. 54 of The Division Courts Act, R.S.O. 1937, ch. 107, the material part of which is as follows:—

“54. (1) Save as otherwise provided by this Act the Court shall have jurisdiction in,—

“(a) a personal action where the amount claimed does not exceed \$120;

“(b) a personal action if all the parties thereto consent in writing, and the amount claimed does not exceed \$200;

“(c) an action on a claim or demand of debt, account or breach of contract, or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed \$200; provided that in the case of an unsettled account the whole account does not exceed \$1,000;

“(d) an action for the recovery of a debt or money demand, where the amount claimed, exclusive of interest, whether the interest is payable by contract or as damages, does not exceed \$400 and the amount claimed is,—

“(i) ascertained by the signature of the defendant or of the person whom as executor, or administrator he represents; or

“(ii) the balance of an amount not exceeding \$400 which amount is so ascertained; or

“(iii) the balance of an amount so ascertained which did not exceed \$800, and the plaintiff abandons the excess over \$400.”

The action is to recover the sum of \$385.21 upon a promissory note dated March 19th, 1938, for \$500 upon which there is a credit of \$157.16 and a debit for accrued interest of \$42.37.

Paraphrasing the section which I have quoted, it provides that the Court has jurisdiction in an action for the recovery of a debt where the amount claimed does not exceed \$400, and the amount claimed is ascertained by the signature of the defendant. Also that the Court has jurisdiction in an action for the recovery of a debt where the amount claimed does not exceed \$400, and is the balance of an amount not exceeding \$400 which amount is ascertained by the signature of the defendant, meaning, in my opinion, that the original amount must not exceed \$400. Also that the Court has jurisdiction in an action for the

recovery of a debt where the amount claimed does not exceed \$400 and the amount claimed is the balance of an amount which did not exceed \$800, which original amount was ascertained by the signature of the defendant, and the plaintiff abandons the excess over \$400.

Mr. Ferguson, in a very well presented argument, sought to have this last provision so construed that the balance of the debt must be more than \$400, and that there must be an abandonment of the excess. This, in my opinion, is a very narrow construction, and yet must prevail if it is the true construction. The result of it would be that under the provisions of subsec. 1(a) a personal action can be brought in the Division Court for any sum up to \$120 although such sum might be the balance of a claim of any given amount; and under subsec. 1(c) an action for debt, etc., may be brought for an amount up to \$200 although that amount may be the balance of any given amount except in the case of an unsettled account in which case the original account must not exceed \$1,000.

There is no doubt in my mind, upon the construction of the whole section, that the Legislature intended under subsec. 1(d) to enlarge the jurisdiction and not to restrict it, and intended to permit actions to be brought in the Division Court up to \$400 even though the debt owing might be more than \$400 provided the plaintiff abandons the excess over \$400.

Mr. Ferguson's argument is that there must be an excess over \$400 which must be abandoned. He cited the case of *Clarkson v. Roberts* (1930), 66 O.L.R. 102, where my brother Riddell, delivering the judgment of the Court, says at page 105:

"The prerequisites are (1) the amount claimed does not exceed \$400, (2) the plaintiff abandons the excess over \$400 of an amount, (3) which did not exceed \$800, that amount being ascertained by the mere production of a document and proof of signature.

"Here (1) the amount claimed does not exceed \$400, (2) the plaintiff abandons the excess over \$400 of an amount, (3) which did not exceed \$800, and this amount is ascertained by producing the document and proving the signature. It, consequently, is a case where the statute is literally met. And it is not of the slightest importance that other evidence must be adduced to prove the title of the plaintiff suing here."

I cannot read this as implying that there must be an excess over \$400. If there be no excess over \$400 and the other conditions are met, then in my opinion the Statute is met.

I think, therefore, that the appeal fails and must be dismissed with costs.

FISHER J.A. agreed with HENDERSON J.A.

Appeal dismissed with costs.

[HOGG J.]

**Wade and The London and Western Trust Co. Ltd.
v. Murray et al.**

Mortgages—Companies—Bond mortgage—Distribution of moneys in hands of trustee for bondholders being amount realized from sale of assets covered by the bond mortgage—Pari passu clause in bond mortgage—Whether moneys should be distributed among bondholders pari passu according to amount due to each for principal and interest or according to amount due to each for principal only.

Where there is a term in a deed of trust and mortgage to secure bonds that all bonds are to rank *pari passu* as a charge upon the mortgaged property, upon a division of the proceeds of realization of the mortgaged property, as between the various bondholders the amount due to each bondholder for capital and interest must be ascertained and the proceeds divided *pari passu* according to the amounts so due to each; if more interest is in arrear on some of the bonds than others, whatever is realized must be divided amongst them rateably in proportion to the total amount due to each bondholder for capital and interest.

A motion for advice and directions as to the proper distribution of certain moneys in the hands of The London and Western Trust Company Ltd. as trustee for bondholders.

The motion was heard by HOGG J. in Weekly Court at Toronto.

N. L. Spencer, for the plaintiffs.

F. K. Ellis, for certain bondholders.

F. A. Landriau, K.C., for certain other bondholders.

The defendants were not represented.

May 28th, 1940. HOGG J.:—This is an application by the plaintiffs for advice and directions as to the distribution of moneys in the hands of the London and Western Trust Company Limited as trustees for the holders of bonds and interest coupons secured by a deed of trust and mortgage. The advice of the Court is requested in respect to the following questions:

(1) Whether upon the true construction of the said deed of trust and mortgage the proceeds of realization of the mortgaged property ought to be distributed among the holders of all outstanding bonds and interest coupons entitled to share therein *pari passu* according to the amount due to each for capital and interest;

(2) Whether upon the true construction of the said deed of trust and mortgage arrears of interest, whether represented by coupon or not, bear simple interest thereon at the rate of 7 per cent. per annum to the date of each distribution of the proceeds of realization as it is made.

By an order of the Court dated the 11th February, 1931, the London and Western Trust Company Limited was appointed receiver and manager of the property and assets comprised in and subject to the deed of trust and mortgage in question herein, and pursuant to the judgment in this cause of the 16th May, 1929, and an order of the 25th March, 1936, amended by a further order of the 28th July, 1939, the property and assets secured by the trust mortgage which was dated 21st July, 1924, from the defendants Thomas W. Murray and Walter A. Dusseau, mortgagors, to the London and Western Trust Company Limited and Howard C. Wade, mortgagees, as trustees, to secure payment by the mortgagors of bonds in the principal amount of \$155,000, were sold for the sum of \$45,000.

By the report of His Honour Judge Coughlin on the passing of the accounts of the receiver filed on the 8th April, 1940, and served upon the interested parties on the 9th April, 1940, it appears that the proceeds of the sale of the said property and assets are in the hands of the London and Western Trust Company Limited and available for distribution among the holders of the securities referred to in the said deed of trust and mortgage. All interest upon the bonds payable on and prior to the 21st July, 1929, has been paid with the exception of the sum of \$92.75, and all interest due and payable on the 21st January, 1930, has been paid except the sum of \$36.75.

The plaintiffs contend that the amount available for distribution, realized from the sale of the assets as aforesaid, should be distributed among the holders of all outstanding bonds and interest coupons according to the amount found due to each for capital and interest.

The deed of trust and mortgage contains a *pari passu* clause. According to Palmer, *Company Law*, 16th ed., p. 286, "The object of the *pari passu* provision is to place all the debentures on the same level as to security; so that, if the security is to be enforced, whatever is realized from it shall be divided amongst them rateably, in proportion to the amounts paid up on each debenture; and if more interest is in arrear on some of the debentures than others, in proportion to the total amount due to each debenture holder for capital and interest."

Where there is a term in the mortgage that all debentures are to rank *pari passu* as a charge upon the property charged, upon a division of the proceeds of realization between the various debenture holders, the amount due to each holder for capital and interest must be ascertained and the proceeds divided *pari passu* according to the amounts so due to each: 5 Halsbury, *Laws of England*, 2nd ed. 491.

In *Trusts and Guarantee Co. Ltd. v. Grand Valley Railway Co.* (1918), 44 O.L.R. 398, in the Court of Appeal, there is an exhaustive discussion by Hodgins J.A. as to the law with respect to the rights and liabilities of holders of interest coupons and that learned Judge refers to a number of cases decided in the United States of America upon this question. In one of such cases it was said that, upon realization of the whole mortgage property, the bonds and the unpaid coupons would probably rank rateably. In another case it was stated that a coupon when payable is a part of the mortgage debt and in a foreclosure of the mortgage is entitled to a *pro rata* distribution with the holders of the residue of the mortgage debt. In a further case it was said that interest coupons are instruments of a peculiar character and that the title to them passes from hand to hand by mere delivery. The mortgage in question in this application contains a term to the effect that the bonds and coupons secured are intended to circulate as negotiable instruments.

The case which appears to be the leading one upon the subject under consideration is that of *Midland Express Ltd.*, [1914] 1 Ch. 41. It is cited by the authors of works on *Company Law*, in discussing this subject. Cozens Hardy M.R. said at p. 47: "In dividing the proceeds of the realization between the various debenture holders the critical date is the moment when the charge crystallized. Some may then have received more interest

than others, but the actual figures for what was then due on all the debentures must then be taken and the proceeds divided rateably between them." In this case there was no trust deed, and it was held that a debenture holder was not a *cestui que trust* but was a mortgagee. Swinfen Eady L.J. stated at page 49: "But from the time when the security crystallizes there can be no priority among the holders of the debentures . . . From that date the debentures are all to rank *pari passu* without any preference to priority one over the other. You are to ascertain what was due to each debenture holder on that date and then without any preference or priority divide the fund rateably between them." The learned Lord Justice held that the principle upon which the decision had been given in the Court below was right.

In the Court below, [1913] 1 Ch. 499, Sargant J. said that the amounts due for principal and interest should be calculated down to the date of the Master's certificate and the assets distributed *pro rata* in accordance with the amounts found due.

The case of *Smith v. Law Guarantee and Trust Society Ltd.*, [1904] 2 Ch. 569, was cited by Mr. Landriau in support of the contention that payment should be appropriated to principal only. The judgment in that case shows that it was based solely upon the construction and meaning of certain orders which had been made in the course of the proceedings and the circumstances present. These orders directed that payments should be made on account generally of what was due for principal and interest but it was held that under the circumstances the orders did not provide for payments of the moneys *pari passu* as between principal and interest. Vaughan Williams L.J. was of opinion that the Court should read these orders as withholding any appropriation until a further application should be made to the Court and, that as it had been ascertained that the principal could not be paid in full, it was unnecessary to ask the debenture holders whether they would prefer that the moneys should be appropriated to interest or to capital because it was in the interest of everyone that the payment should be attributed to capital. The decision in this case was founded entirely upon the circumstances and, as was said by Romer L.J., does not lay down any general principle.

In my opinion the *Midland Express* case enunciates the principle to be followed and the proceeds of realization of the

mortgaged properties should be distributed among the holders of bonds and interest coupons entitled to share therein *pari passu* according to the amount due to each for capital and interest.

I am of opinion with reference to the second question that arrears of interest bear simple interest thereon at the rate of 7 per centum. Both of the questions are answered in the affirmative. Costs of the application should be paid to the parties out of the fund.

Order accordingly.

[COURT OF APPEAL.]

Stevens v. Stevens.

Husband and wife—Separation agreement—Default by husband as to payment of sums stipulated in the agreement—Order made on wife's application for maintenance under The Deserted Wives' Maintenance Act, R.S.O. 1937, ch. 211—Payments provided for in order less in amount than payments stipulated in separation agreement — Action by wife in Division Court to recover difference between amounts stated in order and in the agreement—Election—Choice of remedies—Alternative remedies.

A husband and wife entered into a separation agreement whereby the husband, *inter alia*, agreed to pay certain sums bi-monthly for the maintenance and support of his wife.

Subsequently the husband defaulted as to the payment of the sums stipulated in the agreement and the wife applied to the Domestic Relations Court for an order under The Deserted Wives' Maintenance Act, R.S.O. 1937, ch. 211, and as a result an order was made in that Court requiring the husband to pay to his wife bi-monthly payments in an amount less than those stipulated in the separation agreement.

Subsequently the wife brought this action in the Division Court to recover the difference between the amounts specified for her maintenance in the separation agreement and in the order of the Domestic Relations Court.

Held by the Court of Appeal that the plaintiff wife could not maintain this action for the recovery of the difference between the amounts stated in the order and in the agreement. When the husband defaulted under the separation agreement the plaintiff wife had the right either to sue on the agreement or to apply for an order under The Deserted Wives Maintenance Act. These remedies were alternative and not cumulative and the plaintiff wife was bound to elect. Having applied to the Domestic Relations Court she can not now bring an action upon the separation agreement, and the operation of the separation agreement is under suspension as long as the order of the Domestic Relations Court is outstanding.

AN appeal by the defendant from the judgment of His Honour Judge Shea, sitting in the First Division Court of the County of York, whereby the plaintiff was awarded the sum of \$158.80.

May 30th, 1940. The appeal was heard by MIDDLETON, MASTEN and McTAGUE JJ.A.

H. F. Parkinson, K.C., for the defendant, appellant.

N. H. Shaw, for the plaintiff, respondent.

June 4th, 1940. The judgment of the Court was delivered by McTAGUE J.A.:—On the 12th day of August, 1938, the parties entered into a separation agreement which provided, *inter alia*, for payments by the husband, the defendant, to the wife, the plaintiff, of \$32.50 bi-monthly.

Almost contemporaneously with the execution of the agreement, an arrangement was made that the husband should hand over his fortnightly pay cheques to the wife's solicitor who should make payments on certain creditors' accounts and then distribute the balance, sixty per cent. to the wife and forty per cent. to the husband. This arrangement remained in effect from the 15th day of August, 1938, until the 31st day of May, 1939. On the latter date the wife had received \$82.80 less than she would have received had all payments been made as provided in the formal agreement. From June 15th, 1939, to September 15th, 1939, the defendant's payments were made at the rate of \$32.50 bi-monthly as provided. On the 18th day of September, 1939, the defendant was not permitted access to his children, quite justifiably in the circumstances disclosed by the evidence. However, the incident served as an opportunity, and the defendant had his solicitor write the plaintiff advising that he no longer considered himself bound by the agreement and proposed to make payments for the maintenance of his wife and children at the rate of \$20 bi-monthly instead of \$32.50 as provided in the agreement. Accordingly, in October 1939, he paid only \$40. His counsel on appeal admits liability for \$25 not paid during that month.

About this time the wife invoked the Domestic Relations Court under The Deserted Wives' Maintenance Act, R.S.O. 1937, ch. 211, and had her husband summoned. As a result an order was made requiring him to pay \$24 every two weeks. The order itself was not filed so that its exact terms are not before the Court. At any rate the husband continued to pay at the rate required by the order down to the date of the commencement of this action in the Division Court, with the result that the wife has during that period received \$51 less than she would

have received under the provisions of the separation agreement. She has sued in the Division Court for the difference between what she would have been entitled to under the agreement and what she has actually received, amounting in all to \$158.80. His Honour Judge Shea has given full effect to her contentions without written reasons for judgment. From this the defendant appeals.

With reference to the difference of \$82.80 between what she was entitled to under the separation agreement and what was paid under the arrangement made in her solicitor's office, I can see no reason why Mr. Doyle's evidence, that the payments made under the arrangement were to take the place of payments stipulated for in the agreement until pressing debts were paid, should not be given effect to. There is nothing in the separation agreement precluding such modification, and Mr. Doyle's uncontradicted evidence is that such modification was agreed to. Therefore the appeal must be allowed to the extent of reducing the amount of the judgment by the sum of \$82.80.

The question of the defendant's liability for the difference between what he is ordered to pay by the Domestic Relations Court and what is stipulated for by the separation agreement is much more important.

The plaintiff here with an enforceable covenant in a separation agreement has elected not to enforce the agreement but to invoke the jurisdiction of the Domestic Relations Court. The payments to which she was entitled under the agreement were for maintenance of herself and children. The payments to which she became entitled under The Deserted Wives' Maintenance Act are for the maintenance of herself and children. Under the Act the sanction for non-payment may be imprisonment of the defendant which of course is not the case under the separation agreement. In this particular case the payments under the Act happen to be less than the payments stipulated for in the agreement. It is quite conceivable that the Domestic Relations Court could have made an order entitling her to larger payments than what the separation agreement provides and still have kept below the maximum of \$20 weekly. The plaintiff had alternative remedies as I see it, not cumulative remedies. She was bound to elect. Counsel for the plaintiff has argued strenuously that

the Domestic Relations Court has no jurisdiction with respect to the separation agreement. With that I agree. All the Act provides in this regard is that the circumstance of a separation agreement shall not in itself take the plaintiff out of the category of a deserted wife and thereby bar her from relief under the Act: sec. 1(2). The plaintiff's difficulty, as I see it, does not arise from any lack of jurisdiction in the Domestic Relations Court with respect to the separation agreement but from her own election to invoke the jurisdiction of the Court notwithstanding the separation agreement. It is unnecessary to decide whether the order of the Domestic Relations Court abrogates the agreement, but I take the view that the operation of the separation agreement is under suspension as long as the order is outstanding.

This particular agreement contains a clause which counsel argues is a complete answer to the defendant's contention. It is as follows:

"The said George William Stevens hereby covenants and agrees with the said Eleanor Elizabeth Stevens that in consideration of the premises (and it is upon that express understanding that these presents are entered into) that notwithstanding anything contained in the existing law or any other statute which may hereafter be passed, that the obligation of the said George William Stevens to pay the annual payment hereinbefore provided, shall not be in any way prejudiced and that upon any claim being made by the said George William Stevens that would in any way prejudice or affect the payment of the said annual payment, this covenant and agreement may be pleaded by the said Eleanor Elizabeth Stevens as an estoppel against the said George William Stevens; the said George William Stevens waiving as he hereby does all and every benefit that could or might have accrued to him under and by virtue of the existing law or any statute which may hereafter be passed, but for the above covenant."

Certainly the clause is very broad in its terms and I think unusual in agreements of this character. Whatever its effect might be in other circumstances, in the view I have taken I do not think it is available to the plaintiff after she has made an election to accept the benefits accruing to her under the statute instead of those accruing under the agreement. As I see it,

she has chosen to forego her rights under the agreement and cannot be allowed to adopt part of it in answer to the consequences of her own act.

I would allow the appeal by reducing the amount of the judgment below to the sum of \$25 and depriving the plaintiff of the counsel fee of \$15 awarded by the learned trial Judge. There should be no costs of the appeal.

Appeal allowed in part without costs.

[COURT OF APPEAL.]

Rex v. Hansher et al.

Criminal Law—Appeal by Attorney-General to Court of Appeal from order of trial Judge quashing an indictment—Jurisdiction of Court of Appeal to entertain the appeal—Whether such an order is a “judgment or verdict of acquittal of a trial Court” within sec. 1013(4) of The Criminal Code, R.S.C. 1927, ch. 36.

By subsec. 4 of sec. 1013 of The Criminal Code, R.S.C. 1927, ch. 36, it is provided that “Notwithstanding anything in this Act contained, the Attorney-General shall have the right to appeal to the Court of Appeal against any judgment or verdict of acquittal of a trial Court in respect of an indictable offence on any ground of appeal which involves a question of law alone.”

Held that this section does not confer upon the Attorney-General a right of appeal to the Court of Appeal from an order of a Judge quashing an indictment. An order quashing an indictment is not a “judgment or verdict of acquittal”, since such an order does not free the accused of the charge which stands against him and the Crown is at liberty forthwith to lay a new indictment. Neither is such an order a judgment or verdict of the trial Court.

AN appeal by the Attorney-General for Ontario from an order of His Honour Judge Parker, sitting in the Court of General Sessions of the Peace for the County of York, quashing the indictments against the accused.

On the hearing of the appeal counsel for the accused, by way of preliminary objection, moved to quash the appeal on the ground that the Court of Appeal had no jurisdiction to entertain the appeal.

June 14th, 1940. The motion to quash the appeal was heard by ROBERTSON C.J.O., MIDDLETON and MASTEN J.J.A.

C. R. Magone, K.C., for the Attorney-General for Ontario, appellant.

A. G. Slaght, K.C., for the accused, respondents.

June 20th, 1940. The judgment of the Court was delivered by MASTEN J.A.:—This is an appeal by the Attorney-General against an order of His Honour Judge Parker, dated April 8th, 1940, quashing the indictments in each of these cases. Upon this appeal coming on to be heard, Mr. Slaght, by way of preliminary objection, moved to quash the appeal on the ground that this Court has no jurisdiction to entertain it.

The section of The Criminal Code, R.S.C. 1927, ch. 36, under which the Crown assumes to bring this appeal is sec. 1013, subsec. 4, which reads as follows:

“Notwithstanding anything in this Act contained, the Attorney-General shall have the right to appeal to the Court of Appeal against any judgment or verdict of acquittal of a trial Court in respect of an indictable offence on any ground of appeal which involves a question of law alone.”

We are all of opinion that the words of the section quoted fail to confer on the Attorney-General a right of appeal to this Court against an order quashing an indictment, or in other words that the statute does not confer on this Court jurisdiction to entertain it. No authority is needed to support the general rule that the right of appeal must be clearly given to this Court in order to invest it with jurisdiction, and a consideration of the words of the section just quoted indicates that they are inappropriate and ineffective to confer on the Crown a right of appeal from the order of the Court below quashing the indictments.

The nature and effect of the order in question appears to be procedural merely and does not acquit the accused of the charge which stands against him, and the Crown is at liberty forthwith to lay a new indictment: *Rex v. Bainbridge* (1918), 42 O.L.R. 203, particularly at 224. It is analogous to the former procedure of demurrer in civil cases where the demurrer being allowed, a right to deliver an amended pleading was allowed, but substantive rights remained unaltered. The respondents were committed for trial and ought to be tried. The fact that the indictment presented by the grand jury was not good and effective in law, in that it failed to set forth definitely the acts with which the Crown intended to charge the accused, does not entitle them to an acquittal without trial. The quashing of the indictment is one thing and the directing of an acquittal is quite another: *Crane v. Public Prosecutor*, [1921] A.C. at 330.

Dealing more particularly with the words of subsec. 4 it seems to me that what is made appealable is limited to the act of a trial Court, but the trial Court at the General Sessions of the Peace consists of the Judge and the jury, and the Judge acting alone is not the trial Court.

But, further, it cannot be said that an order quashing the indictment is a "judgment or verdict of acquittal", for acquittal means a complete discharge of the accused, which is not the case here. "Acquittal" is defined in Murray's dictionary is as follows:

"A setting free or deliverance from the charge of an offence, by verdict, sentence, or other legal process."

The following are examples:

"A.D. 1772, Junius Letters: The jury should bring in a verdict of acquittal.

"1840. Macaulay, Clive 88: The sentence ought to be one, not merely of acquittal, but of approbation."

In Stroud's Judicial Dictionary I find the following:

"The word 'acquittal' is verbum equivocum, and may in ordinary language be used to express either the verdict of a jury, or the formal judgment of the Court, that the prisoner go thereof without day". Per Tindal C.J. in *Burgess v. Boetefew*, 13 L.J.M.C. 126.

While it is true, as pointed out by Mr. Magone that by sec. 835 a Judge acting under Part XVIII is authorized to pronounce the same verdict that might be given by a jury, I find myself quite unable to say that the order quashing an indictment which is the present case, could possibly be construed to be a "verdict of acquittal" within the meaning of subsec. 4 of sec. 1013.

After careful consideration of Mr. Magone's arguments founded on the former practice relating to a motion in arrest of judgment, I am unable to see how they apply here.

The principle seems to me to be entirely different; for the judgment is arrested because that which assumes to be a trial resulting in finding of guilt has no legal validity and the whole proceeding is set aside, and judgment of acquittal is given which, however, is no bar to a fresh indictment: Archbold on Criminal Pleading, 29th ed., p. 223.

But on demurrer or on motion to quash the indictment there is no acquittal, there has been no trial real or assumed, nothing

but an order quashing the indictment and where the error is formal and amendable, making the necessary amendment.

For these reasons I am of opinion that the order of His Honour Judge Parker quashing the indictment is neither a judgment nor a verdict of acquittal, nor is it a judgment or verdict of the trial Court, and in the situation here existing subsec. 4 of sec. 1013 confers on the Attorney-General no right of appeal.

The appeal should therefore be quashed.

I should add that it is entirely possible that if this Court had jurisdiction to entertain the appeal a view different from that reached by the Court below might have been expressed but in the circumstances we refrain from any statement of opinion in that regard.

Appeal quashed.

[COURT OF APPEAL.]

Re Gould, Ex parte Garvey.

Limitation of actions—Claim by creditor against estate of deceased person—Statement made by deceased to creditor at time of loan that “she would pay it back as soon as she possibly could after they got going”—Effect of promise—Uncertainty—Whether period prescribed by The Limitations Act, R.S.O. 1937, ch. 118, ran from date of advance or from date when it was proven deceased had assets with which to pay the debt—Onus of proof—Corroboration.

In 1927 the claimant lent his niece the sum of \$2,000 for the purpose of assisting his niece and her husband in the purchase of a farm. There were no formalities in connection with the transaction and no receipt or promissory note was given.

At the time the money was advanced by the claimant his niece said to him that “she would pay it back as soon as she possibly could after they got going.” The farm was purchased by the niece and her husband with the moneys advanced by the claimant and with other moneys, and the deed was made to the niece and her husband as tenants in common.

The niece died on May 19th, 1939, without having repaid any of the money which her uncle had advanced to her and without having paid any interest to her uncle.

The will of the niece contained the following among other directions to her trustees, to whom she devised and bequeathed all her estate: “To pay to my uncle, Henry Garvey, the sum of \$2,000; this to be in payment of the money he so kindly loaned to me when purchasing our farm.”

Because of a deficiency of assets in the estate of the niece the uncle presented his claim as a creditor and his claim as a creditor was contested, it being contended on behalf of the husband of the niece (a) that the transaction was one of gift and not of loan; (b) that The Limitations Act, R.S.O. 1937, ch. 118, barred the claim, and (c) that the direction in the will was not a sufficient acknowledgment of the debt.

Held by the Court of Appeal that the claimant was entitled to rank as a creditor for the following reasons:

1. On the evidence the transaction was a loan and not a gift.
2. There was ample corroboration of the claimant's evidence as to the substance of the transaction, particularly in the will itself, supported by the evidence as to the oral instructions given for the will.
3. The promise of the niece to repay the money "as soon as she possibly could after they got going" was not too vague to be enforced and the debt was repayable when the condition of ability to repay was established.
4. The period prescribed by The Limitations Act ran from the time when the niece was able to repay the debt. The onus was upon the husband of the niece who relied upon The Limitations Act to establish when the niece had become able to repay and on the evidence this onus was not satisfied; therefore the period prescribed by The Limitations Act had not even commenced to run in the lifetime of the niece.

AN appeal by Henry Garvey from an order of Makins J. dismissing an appeal by the present appellant from the judgment of His Honour Judge Perrin, of the Surrogate Court of the County of Oxford, dismissing the appellant's application under sec. 65 of The Surrogate Courts Act for an order allowing his claim as a creditor of the estate of Clara Rose Gould, deceased.

May 3rd, 1940. The appeal was heard by ROBERTSON C.J.O., MASTEN and MCTAGUE, JJ.A.

I. Levinter, K.C., for Henry Garvey, appellant.

J. J. Robinette, for William Herbert Gould, respondent.

The executors were not represented.

May 15th, 1940. ROBERTSON C.J.O.:—This is an appeal from the order of Mr. Justice Makins of 3rd April, 1940, dismissing an appeal by the present appellant from the judgment of Judge Perrin given in the Surrogate Court of the County of Oxford, dismissing the appellant's application under sec. 65 of The Surrogate Courts Act, for an order allowing his claim as a creditor of the above-mentioned estate.

The facts are briefly as follows. The appellant, Henry Garvey, is the uncle of the deceased Clara Rose Gould. For a time before her marriage to the respondent, William Herbert Gould, she lived with her uncle and took charge of his domestic arrangements, he being a farmer and a bachelor. The respondent was at times employed in farm work by the uncle. In 1927 Gould and appellant's niece were married and were ambitious to have a farm of their own. Between them they had not enough money and the appellant offered to help, and lent his niece \$2,000, which, with the money they had of their own and what

they were able to borrow on mortgage, enabled them to buy a farm, for which they paid \$9,000. This was in December, 1927. There were no formalities about the transaction as between the appellant and his niece, as they were on terms of mutual affection and confidence. No receipt for the money was given, nor note nor other writing. Whatever the bargain, it was all by word of mouth.

Clara Rose Gould died on or about 19th May, 1939, without having repaid any part of the money her uncle had advanced. She made her will on the 8th May, 1939, containing the following, among other directions, to her executors and trustees, to whom she devised and bequeathed her real and personal estate:

"6. To pay to my uncle, Henry Garvey, the sum of \$2,000; this to be in payment of the money he so kindly loaned to me when purchasing our farm."

Before the will was drawn Mrs. Gould had expressed an urgent desire to provide for the repayment of the loan her uncle had made her. That the direction was for payment of the \$2,000 as a legacy instead of as a debt, arose from the simple fact that the conveyancer who drew the will says he could find no place in the printed form he used for the latter direction. As it turns out appellant is not likely to receive \$2,000 by way of legacy on a distribution of the estate. He, therefore, duly presented his claim as a creditor for \$2,000 to the executors, who then gave formal notice contesting the claim and requiring the appellant to establish it. Application was duly made by the appellant to His Honour Judge Perrin to establish the claim. On the hearing of the matter before him counsel appeared for the appellant and for the executors, and also counsel representing the respondent, William H. Gould, the husband of the deceased. The burden of the contest before the Surrogate Court Judge was assumed by counsel for the husband, and on the appeals to Mr. Justice Makins and to this Court no one but counsel for the husband appeared to oppose the appeals.

The grounds of dispute of the claim given by the executors in their notice of contestation were, (1) that the \$2,000 advanced by the uncle was a gift to his niece and not a loan, and (2) that the claim was barred by the Limitations Act, if it should be found that there was a loan. His Honour Judge Perrin found upon the evidence that the \$2,000 was a loan and not a gift.

It would appear that the case was argued by both sides on the basis that if there was a loan, it was repayable on demand, and that unless clause 6 of the will operated as an acknowledgment sufficient to satisfy the statute, the period of limitation ran from the making of the loan in December, 1927. The learned Surrogate Judge held that clause 6 of the will was not such an acknowledgment of the debt as would give a new starting point under the Limitations Act, and accordingly held that the claim was barred by the statute. Mr. Justice Makins agreed with the opinion of the Surrogate Judge on both questions.

I agree with the finding that the \$2,000 was a loan and not a gift, and that a debt of \$2,000 was created by the transaction between the appellant and his niece. Counsel for appellant now argues that the loan was not repayable on demand and that it is not established by any evidence that the time for payment had arrived before the death of the niece. It is necessary, therefore, to consider that question before proceeding to consider whether clause 6 of the will is a sufficient acknowledgment under the Limitations Act. The fact that the point was not raised by counsel in either Court below does not prevent the appellant from raising it now. It was fully discussed in the argument before us, and all the relevant evidence is on the record.

In the course of cross-examination by counsel for respondent, appellant made the following statement, "When I loaned the money to my niece she said that she would pay it back as soon as she possibly could after they got going". It is upon this statement that counsel for appellant rests his contention that the loan was not repayable on demand, but at a future time which could only be determined by evidence.

For the respondent it is contended in the first place that appellant's evidence of this promise should not be credited. He relies strongly upon a statement made by appellant when examined-in-chief by his own counsel. After appellant had been asked in a rather broad and general way about the making of the loan, the purchase of the farm and the departure of his niece with her husband to live upon it, the examination proceeded as follows:

"Q. Then after the farm was bought, of course, Mr. Gould and his wife went to live on their own farm? A. Yes.

Q. Where was that in relation to your farm? A. It is about a mile south of us on the same side of the road.

Q. What was the next thing that happened so far as the loan was concerned? A. Well, that made up the \$9,000, and they bought the farm.

Q. What happened? Did you collect anything on it, or was there any promise made as to when it should be repaid. Anything agreed on? A. No, not just then. Not just then.

Q. What happened next anyway? A. Well, it was a year afterward I think, after they bought the farm, that my niece or Mrs. Gould and Mr. Gould came to me and wanted to give me \$100 interest.

Q. Yes? What did you say? A. I said there is no hurry that I didn't want it just now until they got going better on the farm."

It is not very certain to what appellant had reference when he answered, "No, not just then. Not just then". His counsel having finished his questions about the making of the loan and the purchase of the farm, was trying, perhaps with some impatience, to prod him on to the next stage. There were four separate questions asked all as one, that brought the answer, "No, not just then", and it is not very clear which of them appellant thought he was answering. From what follows, the witness may have been answering the question as to whether he collected anything. In any event I do not think one wisely holds a witness of this class to a too literal interpretation of all his answers. It is not that he lacks intelligence, but to tell his story by question and answer is something he is quite unaccustomed to, and he thinks more slowly and talks less readily than counsel. To be convinced of his honesty and of his desire to tell the truth is the matter of first importance—and of these the trial Judge was evidently satisfied. An occasional stumble in answering a question not too clearly put is not important. It was the pointed question of respondent's counsel, "Isn't it peculiar that this was a loan and you didn't have some discussion at the time as to when it was to be paid and what the rate of interest was to be?" that brought the answer, "Well, just the agreement, when I loaned the money to my niece she said that she would pay it back as soon as she possibly could after they got going."

I find no difficulty in accepting this statement of the occurrence. Such a promise from the niece is assuredly more in

keeping than a mere dumb acceptance, and that seems upon the evidence the only alternative. The offer of interest by the niece a year later, and the non-acceptance of it by appellant also accord well with an understanding that the principal was to stand.

Respondent's counsel takes the further point that appellant's evidence of this promise of payment is not corroborated, and that corroboration is necessary in a claim against the estate of a deceased person. It is not essential, however, that appellant's evidence should be corroborated in every detail. In *Minister of Stamps v. Townend*, [1909] A.C. 633, at p. 638, Lord Loreburn said "that when there is a substantial corroboration of the testimony given by the interested party, it confirms the credit, not only of the statements which are expressly supported, but of all statements made by the interested party." The principle is, I think, applicable here. There is ample corroboration of appellant's evidence as to the substance of the transaction, that is, the making of the advance and its character of a loan. One could hardly ask for better corroboration of the making of a loan than the will itself, supported as it is by the evidence of the oral instructions given for it. With this corroboration of the substance of the transaction, I see no ground for refusing full credit to appellant's evidence of the statement made at the time by his niece, that she would pay the money back as soon as she possibly could after they got going.

It is necessary next to consider the effect in law of this statement. The promise formed part of the transaction of loan and was accepted by appellant as a satisfactory promise of repayment. It is submitted, however, by counsel for the respondent that the statement is too vague to be given any legal consequence. He contends that the loan was repayable on demand, notwithstanding this promise to pay at a time in the future after certain conditions were fulfilled. There are many cases where a promise to pay "as soon as I am able", or out of a specific fund not yet in hand and other similar promises, have been held a sufficient promise to take a case out of the Statute of Limitations after it has commenced to run: *Tanner v. Smart* (1827), 6 B. & C. 603; *In re Kensington Station Act* (1875), 20 L.R. Eq. 197; *Rohlin v. McMahon* (1889), 18 O.R. 219. In such cases, however, the Court does not disregard such a condition when attached to the promise to pay as being too vague to be

enforced, but, on the contrary, requires the creditor seeking to enforce the promise to pay to establish that the condition of ability to pay, or whatever the condition may be that was attached to the promise, has been fulfilled. Respondent's counsel endeavours to distinguish cases of this kind and contends that they are not applicable here upon the ground that while to defeat The Limitations Act a promise to pay the past due debt is essential, there is not really a new contract between the parties, the new promise being a mere unilateral act of the debtor. Granting that such a distinction may exist, it does not seem to afford any ground for holding that the promise may be more vague in its terms in the one case than in the other and still be a good promise that the Court will enforce according to its terms and not otherwise. Why cannot the Court give effect to all the terms of a promise that would seem to be a most reasonable and likely arrangement for repayment between the appellant and his niece, when a promise to pay with the same condition attached, if made after the debt is due, would unquestionably be valid and enforceable? The time when payment is due, is to be ascertained by evidence in the same way in either case, and in either case the creditor to succeed in an action for payment would have to prove fulfillment of the condition—that is, in this case, that they had got going and become able to pay. An objection of this character in such a case as the present was rejected in the case of *Ingrebretsen v. Christensen* (1927), 37 Man. R. 93. In my opinion the proper conclusion is that it is not established that the statute had even begun to run in the lifetime of the deceased.

The further objection was raised by counsel for the respondent that if the time agreed upon for payment was as appellant now contends, there is no evidence that the time for payment has yet arrived. It is not necessary, in order that the appellant shall succeed in this proceeding instituted under sec. 65 of the Surrogate Courts Act, that his claim should be due and payable. Subsection 10 of sec. 65 says that the provisions of the section shall apply notwithstanding that the claim or demand is not presently payable, and that for that reason an action for the recovery of it could not be brought. Moreover, it may well be that on the death of the niece the debt became due. In *Barnes v. Wilson* (1913), 29 T.L.R. 639, there had been an agreement

to repurchase shares, one of the terms being that the shares were to be purchased in lots of any number under 200 at such times as suited the convenience of the purchaser, and at no other times. The purchaser having died without having taken up all the shares, and he having definitely agreed to buy all of them, it was held that his administrator could be compelled to take at once all the shares that had not been taken. The term of the agreement that the purchaser should be bound to take up shares only at such times as suited his convenience and at no other times, was treated as a term made for his personal convenience and on his death the condition came to an end. I think the same principle may be applied here. The loan was undoubtedly to be repaid. The time for payment was postponed wholly for the convenience of the niece, and on her death this condition, made solely for her benefit, ceased to operate. It may be further that clause 6 of the will is to be regarded as evidence that on her death the time for repayment should be no longer postponed.

For these reasons I am of the opinion that until the death of the deceased the Statute of Limitations had not commenced to run against this claim. The appeal should be allowed with costs, and the appellant should be found entitled to rank as a creditor for his claim in the administration of the estate.

McTAGUE J.A. agreed with ROBERTSON C.J.O.

MASTEN J.A.:—This is an appeal by Henry Garvey, claiming as a creditor of the estate of Clara Rose Gould. The appeal is from the judgment of Makins J., dated April 3rd, 1940, dismissing an appeal from the judgment of His Honour Judge Perrin, Surrogate Judge of the County of Oxford, dated January 9th, 1940. The Surrogate Judge found that the appellant's claim for \$2,000 against the estate was barred as a debt by the Statute of Limitations.

The first contention on the part of the appellant is that the advance of money admittedly made by the appellant to the deceased was a loan and not a gift, and that at the time of the advance itself the deceased gave a conditional promise to pay the debt "as soon as they could after they got going", and that the respondent who sets up the Statute of Limitations to defeat the appellant's claim has failed to adduce any evidence that the position or situation stipulated as a condition by the contract

arose more than six years before claim was made in this proceeding and, consequently that the statute never began to run.

The appellant's second contention is that if the Statute of Limitations has any application, the will of the deceased testatrix is a sufficient acknowledgment to take the case out of the statute.

Third, that there being an express direction to pay this particular debt, the Statute of Limitations can have no application.

For the respondent it was submitted as follows:

1. By the agreement of the parties when the advance was made, no time for repayment was fixed, and the statute began to run at once. The statement in the evidence is a mere suggestion of pious intention and does not import any contractual obligation as to the time of repayment.

2. If there was an effective promise to pay "as soon as they could after they got going", and if this formed part of the contract, then the onus of establishing that the time has not arisen is on the appellant and there should be a reference back to the Surrogate Judge to find as a fact when the loan was repayable.

3. The words of the will of the deceased testatrix are not sufficient to effect an acknowledgment, and the giving of a legacy is not an adequate acknowledgment of a debt.

The facts are that in the year 1927 the appellant Garvey advanced the sum of \$2,000 to his niece, Clara Rose Gould, for the purpose of assisting her and her husband, William Henry Gould, to purchase a farm for \$9,000. It was conveyed to Clara Rose Gould and her husband as tenants-in-common. The \$9,000 purchase price was raised by (a) a first mortgage to one Hanlon to secure \$5,000; (b) \$1,000 from moneys saved by the husband, the respondent; (c) \$1,000 from moneys saved by the testatrix, Clara Rose Gould; (d) \$2,000 advanced to Clara Rose Gould by the appellant Henry Garvey.

Clara Rose Gould died on May 19th, 1939, having made her last will dated on May 8th, 1939. Her will was admitted to probate by the Surrogate Court of the County of Oxford on June 23rd, 1939.

The will of the testatrix directs the executors and trustees of the will "to pay to my uncle, Henry Garvey, the sum of Two thousand dollars; this to be in payment of the money he so kindly loaned to me when purchasing our farm," and "to convey and

transfer to my husband, William Henry Gould, my interest in the farm we now own in North Oxford as well as in the livestock, implements and produce situate thereon or belonging thereto.”

The appellant Garvey was examined *viva voce* before the learned Surrogate Judge in support of his claim, and at page 16, line 39, of the evidence, he says:

“Q. Then if it was a loan, why didn’t you collect interest on it?

A. Well, the year after I let Mrs. Gould have it, Mr. Gould and her both came to me with the interest, \$100, and handed me the cheque. I says no, I won’t bother taking that now until you get better fixed with your farm.

Q. Isn’t it peculiar that this was a loan, and you didn’t have some discussion at the time as to when it was to be paid and what the rate of interest was to be?

A. *Well, just the agreement, when I loaned the money to my niece she said that she would pay it back as soon as she possibly could after they got going.”*

And at page 8, referring to a conversation which he had with the testatrix a short time before the death of the testatrix, he testifies that the testatrix spoke as follows:

“Q. Yes?

A. And she says ‘Well, Henry, dad thinks we will be soon able to pay you back that \$2,000 you loaned me.’

“Q. I didn’t catch what you said—what did she say?

A. She said that she was pleased she was getting in a position to be able to pay back the loan.

Q. She was pleased that she was getting in the position where she could pay back the loan?

A. That is, getting along so well on the farm, and getting the mortgage paid off.

Q. How much at this time was there left of the \$5,000 to be paid off?

A. Just \$1,200 about.

Q. So she expressed her pleasure at getting in a position where she would soon be able to repay you your money?

A. Yes.

Q. What did you say about it?

A. I said I was glad to hear it.”

This evidence is uncontradicted and is to my mind convincing.

The appellant having filed his claim as above stated, the executors gave notice of contestation to the appellant, and the Surrogate Court Judge heard the matter on January 6th, 1940, and disallowed the claim.

It will be convenient at this stage to refer shortly to some of the cases bearing upon the first question which arises, namely, as to the quality and effect of the words spoken at the time of the advance, with the view of determining whether they form part of the original agreement and when, if ever, the statute began to run.

In the case of *Edmunds v. Downes* (1834), 2 Cr. & M. 459, in an action on a promissory note payable with interest, the words in defendant's letter read as follows: " 'I shall be most happy to pay you both interest and principal as soon as convenient' ". At page 463, Bayley, B., says:

"I think the words, 'as soon as convenient,' mean that it is not convenient at present, and as there is no evidence that it ever afterwards was convenient to the defendant, or that he was of ability to pay, there ought to be a new trial."

And on this same page, the last paragraph reads as follows:

"Upon the question where the promise was conditional or not, there are two or three cases much resembling the present. In one the promise was to pay 'as soon as my situation will allow,' in another the defendant said, 'he should be happy to pay the plaintiff if he could; that money was due to him from J. G., and that if the plaintiff could get it, he might pay himself.' In those cases it was held that the promise was conditional, and that some evidence of ability to pay must be given; and I think in the present case some evidence was requisite to show that the defendant was able to pay, or that it was convenient for him to do so.' "

In *Waters v. Thanet* (1842), 2 Q.B. 757, the defendant, being a drawer of two bills of exchange of which the plaintiff was holder, gave him a written promise that in consideration of plaintiff having agreed not to proceed against him, defendant thereby debarred himself of all future plea of the Statute of Limitations in case of his being sued and thereby promised to pay the bills "whenever my circumstances may enable me to do so and I may be called upon for that purpose". It appeared from the evidence that the defendant's circumstances had en-

abled him to pay in full in 1825 at a time more than six years before action brought. The plaintiff was non-suited.

In the course of his judgment, Lord Denman C.J. points out that the issue was whether under the terms of the agreement the right of action accrued within six years and holds that when the defendant became of ability to pay there was a complete right to bring the action. Incidentally, though not expressly, it was determined that the words quoted were effective to make the agreement conditional and that the right of action accrued only when the condition was fulfilled.

In *Hammond v. Smith* (1864), 33 Beav. 452, Sarah Smith being indebted to the plaintiff wrote to him on the 4th of March, 1856, stating that her parents were living, but were of great age and in a precarious state of health. She added "*I will pay you as soon as I get it in my power; before I cannot, I have nothing to pay with or I would willingly do it.*"

Her parents died on or before the 9th of February, 1861, leaving her entitled to property more than adequate to pay the plaintiff in full. Sarah Smith having died in 1862, the plaintiff sued her executors in 1863. The Statute of Limitations was pleaded in defence.

The Master of the Rolls (Sir John Romilly) held that "the letter of the 4th of March, 1856, constituted a distinct promise on the part of the testatrix to pay the debt when she should be of ability and that the statute did not begin to run until the death of her father when she first had the means of paying the debt. Judgment accordingly."

In the case of *Ingrebretsen v. Christensen* (1927), 37 Man. R. 93, the agreement was in the following words:

"This is to certify that I, Christen Christensen have received Three hundred and seventy-five dollars as a temporary loan and that same is to be paid in full as soon as possible."

It was held by the Court of Appeal confirming the judgment of the Court below that where the bearer promises to repay "as soon as possible" the Statute of Limitations will not begin to run until the bearer has ability to pay; and the same principle was upheld in the case of *Re Wahn Estate* (1927), 37 Man. R. 95.

As regards the onus of proof, a distinction is to be observed between cases where the six-year period of liability has passed and the statute affords a defence but subsequently the debtor

gives a written acknowledgment, and cases where the right of action is subject to a condition so that a right of action cannot arise until the term of the condition is fulfilled.

In the former case the onus is on the plaintiff creditor to establish an effective acknowledgment. But in the latter case the onus is on the defendant to establish his defence that the statute began to run more than six years before action brought.

In the present case the onus being on the respondent to establish that the claimant's right of action arose more than six years before the present proceeding he has failed to adduce any evidence to satisfy that onus, and the claimant is entitled to be scheduled as a creditor in the report of the Surrogate Judge.

As to the right to immediate payment I agree with the view expressed by my Lord the Chief Justice that the extension of time for payment was personal to the testatrix and came to an end at her death.

I desire to add however that in my opinion the evidence with regard to the value of the present equity in the farm, coupled with the statement made by the testatrix in her will, afford abundant support for the conclusion that the condition of the original agreement has now been fulfilled.

This conclusion renders it unnecessary to deal with the other questions argued before us on the appeal.

With regard to such points as I have failed to discuss I concur in the reasons of my Lord the Chief Justice.

The appeal should be allowed with costs here and below, to be paid by the respondent W. H. Gould. The executors will be entitled to their costs as between solicitor and client out of the estate.

Appeal allowed.

[COURT OF APPEAL.]

Re Gluckstein and Smith.

Bankruptcy—Appeal—Jurisdiction of Court of Appeal to entertain an appeal from an order of the Bankruptcy Judge varying a prior order and permitting the trial of an issue to determine the validity of a mortgage conditionally upon payment of certain costs—Whether amount involved exceeded \$500—Whether amount involved is the amount of the mortgage or the amount of the costs to be paid—The Bankruptcy Act, R.S.C. 1927, ch. 11, sec. 174(1), clauses (a) and (c).

By clause (c) of subsec. 1 of sec. 174 of The Bankruptcy Act, R.S.C. 1927, ch. 11, an appeal lies to the Court of Appeal from an order of the Bankruptcy Judge if the amount involved in the appeal exceeds \$500.

Held, that an appeal under this clause lies to the Court of Appeal by a mortgagee from an order of the Bankruptcy Judge setting aside a prior order made by him and directing the trial of an issue to determine the validity of a mortgage purporting to secure \$2,000 and interest conditionally upon the payment by the mortgagee of less than \$500 for costs and by way of security for costs, the appellant mortgagee contending that the order appealed from should have been made unconditionally. The amount involved on such an appeal is really the amount secured by the mortgage and not the amounts the appellants are required to put up in the way of costs and security for costs. When a litigant seeks to enforce rights that he claims are his, and an order is made that will prevent him asserting the rights unless he first complies with certain conditions which he says are improperly imposed, the amount really involved in an appeal in such circumstances is the amount of the claim and not the amount of money that it may be necessary for him to put up to comply with the conditions.

AN appeal by Jacob Altberger and B. M. Altberger from an order of Urquhart J. rescinding or varying on certain conditions a prior order of Urquhart J.

Counsel for the trustee in bankruptcy of the estate of Gluckstein and Smith, debtors, by way of preliminary objection, moved to quash the appeal on the ground that the Court of Appeal had no jurisdiction to entertain the appeal.

June 7th, 1940. The motion to quash the appeal was heard by ROBERTSON C.J.O., FISHER and HENDERSON JJ.A.

J. L. G. Keogh, for J. and B. M. Altberger, appellants.

R. M. W. Chitty, K.C., for the trustee, respondent.

June 19th, 1940. The judgment of the Court was delivered by ROBERTSON C.J.O.:—This is an appeal by Jacob Altberger and Ben M. Altberger from the order of Urquhart J. of the 15th May, 1940.

By an order of the 14th September, 1939, made in the matter of this bankruptcy, Urquhart J. declared that the interest of the debtor Rose Smith in certain lands in the City of Peterborough was an asset of her estate free from a certain mortgage from the said debtor to the appellant Jacob A. Altberger, and ordered that the registration of the mortgage be, and the same was thereby, vacated. The mortgage purported to secure \$2,000 and interest. No one had appeared to oppose the motion for this order. By notice of motion dated 30th April, 1940, the appellants Jacob Altberger, as mortgagee, and Ben M. Altberger as assignee of the mortgage, applied to review, rescind or vary the order of the 14th September, 1939, on the grounds, among others, that no notice of the application was ever received by Jacob Altberger, that no one was present to represent Jacob Altberger when the order was made, and that the mortgage is a valid security for money actually advanced.

On this application the order now appealed from was made. By this order it was directed that upon the applicants, within 15 days from the date of the order, paying to the trustee his costs of the motion of the 14th September, 1939, with the costs of the registration of the certificate of that order, together with the costs of the motion for the order then presently made, fixed at \$40, and paying into Court the sum of \$200 to secure the costs of the trustee of the issue therein directed, and upon the applicants filing a waiver of all preliminary proceedings and a consent to an issue, in the terms set out in the order, to determine the validity of the mortgage, the order of the 14th September should be rescinded, but that if the applicants failed to comply with these conditions the order of the 14th September, 1939, should stand in full force and effect. The order then proceeded to direct that if the applicants complied with the conditions set out in the order, the parties should proceed to the trial of an issue to determine whether the lands in question were assets of the debtor, Rose Smith, free from the mortgage, and whether the mortgage was invalid against the trustee.

The appellants assert that they are entitled to have the order of the 14th September, 1939, set aside unconditionally. They say that this order was made without jurisdiction.

On the present appeal coming on to be heard a preliminary objection was taken on behalf of the trustee that there was no right of appeal. This preliminary objection was then argued and judgment was reserved upon it, argument of the appeal standing in the meantime. For the appellant it was argued that there was a right of appeal under clauses (a) and (c) of subsec. 1 of sec. 174 of The Bankruptcy Act, that is, that the question to be raised on the appeal involves future rights, and that the amount involved in the appeal exceeds \$500.

I am not inclined to the view that upon the proper interpretation of clause (a) there are future rights involved. There has been a good deal said in some cases, particularly in cases under The Winding-up Act, about the propriety of giving a wide interpretation to the words "future rights", and, without assuming to dissent from or to question earlier cases under The Winding-Up Act, or under The Bankruptcy Act, I think the words are given their proper application in the decision of this Court in *Re Ditchburn Boats and Aircraft (1936) Limited* (1938), 19 C.B.R. 240. There have been numerous unreported cases in bankruptcy in which the Court of Appeal of this Province has interpreted the words "future rights" as they were interpreted in the *Ditchburn* case.

It is, however, not necessary, in my opinion, to rest our decision in this case upon the interpretation of clause (a). I think there is a right of appeal under clause (c), the amount involved in the appeal exceeding \$500. In my opinion the amount involved in the appeal is really the amount secured by the mortgage and not the amount the appellants are required to put up in the way of costs and security for costs. The claim of the appellants in this appeal is that they are entitled to have the order of the 14th September, 1939, set aside unconditionally and without complying with the terms imposed upon them by the order appealed from. When a litigant seeks to enforce rights that he claims are his and an order is made that will prevent him asserting the rights unless he first complies with certain conditions, which he says are improperly imposed, the amount really involved in an appeal in such circumstances is, in my opinion, the amount of the claim and not the amount of money that it may be necessary for him to put up to comply

with the conditions. The right that he claims to assert unconditionally is really denied him when the conditions are imposed.

For these reasons the preliminary objection is overruled, and the appeal must be placed upon the list in due course for argument upon the merits.

Preliminary objection overruled.

[ROSE C.J.H.C.]

Davies v. Davies et al.

Divorce—Practice—Power of the Court to abridge the term of six months within which cause may be shown why a judgment nisi should not be made absolute—Rule 18 of the Rules Respecting the Conduct of Matrimonial Causes—The Divorce Act (Ontario) 1930, ch. 14 of the Dominion Statutes of 1930—Distinction between matters of substantive law and matters of procedure in divorce actions.

The Court has no power to abridge the term of six months within which cause may be shown why a judgment nisi in a divorce action should not be made absolute.

Rule 18 of the Rules Respecting the Conduct of Matrimonial Causes is absolute in its terms and provides expressly that the provisions of Rules 175 and 176 of the general Rules which give power to enlarge or abridge the time prescribed by the Rules or by an order shall not be applicable.

The Divorce Act (Ontario) 1930, being ch. 14 of the Dominion Statutes of 1930, introduced into Ontario the substantive law of England as to the dissolution of marriage and as to the annulment of marriage as that law existed on the 15th day of July, 1870. But it did not introduce into Ontario the English practice in matrimonial causes. The time within which cause may be shown why a judgment nisi in a divorce action should not be made absolute is a mere matter of procedure, and therefore the provisions of Imperial statutes in force in England in 1870 empowering the Court to abridge the time between the decree nisi and the application for judgment absolute were not introduced into Ontario by The Divorce Act (Ontario) 1930.

A motion by the defendant Davies for an order that the term of six months within which cause may be shown why the judgment nisi for divorce should not be made absolute be abridged.

The motion was heard by ROSE C.J.H.C. in Weekly Court at Toronto.

Peter White, Jr., for the defendant Davies.

No one *contra*.

May 20th, 1940. ROSE C.J.H.C.:—On April 23, 1940, the plaintiff obtained a judgment nisi for dissolution of marriage. The defendant Davies now moves for an order that the term of six months within which cause may be shown why the judgment should not be made absolute be abridged, and that the notice to be served upon the defendant spouse and the Attorney-General pursuant to Rule 19 of the Rules Respecting the Conduct of Matrimonial Causes be varied accordingly. No one appears for the plaintiff or for the Attorney-General, on whom notice of the motion was served, but the plaintiff's solicitor has written to the solicitor for the defendant Davies saying in effect that the plaintiff concurs in the motion.

After separation from his wife the defendant Davies went through a form of marriage with his co-defendant. There are two children of that invalid marriage and the parties to it profess to desire to marry and so to effect the legitimation of those children; and the defendant Davies puts forward as a reason why the period of six months should be shortened the fact that there is a "strong possibility" that he may on short notice be sent to England in connection with the service in which he is engaged. The affidavit does not convince me that the possibility is as great as is suggested; indeed what the deponent says about the nature of the work in which he is engaged, and his peculiar qualification for that work, appears to me to suggest that the probability is that he will be kept in Canada. Therefore, if I thought that there was vested in me any power to exercise the discretion which I am asked to exercise, I should, before considering whether a case for the exercise of that power has been made out, give leave to the defendant to supplement his materials by the evidence of someone who has greater knowledge of the probabilities of the case than he himself seems to possess. However, in the view that I take of the case, the necessity for a consideration of the question whether the discretion ought or ought not to be exercised does not arise.

Rule 18 of the Rules Respecting the Conduct of Matrimonial Causes is absolute in its terms and provides expressly that the provisions of Rules 175 and 176 of the general Rules which give power to enlarge or abridge the time prescribed by the Rules or by an order shall not be applicable. But counsel for the defendant Davies contends that Rule 18 is overridden by the Dominion statute which confers jurisdiction in divorce — The Divorce Act (Ontario), 1930, (ch. 14 of the Dominion Statutes of 1930). By that Act the law of England as to the dissolution of marriage and as to the annulment of marriage as that law existed on the 15th day of July, 1870, in so far as it has not been repealed as to the province by any Imperial Act or by any Act of the Parliament of Canada, was brought into force in Ontario, and the Supreme Court of Ontario was given jurisdiction for all the purposes of the Dominion Act. In England in 1860, by the Act 23-24 Vict., ch. 144, sec. 7, it was enacted that every decree for a divorce should, in the first instance, be a decree nisi, not to be made absolute till after the expiration of such time, not less than three months from the pronouncing

thereof, as the Court should by general or special order from time to time direct; and in 1866, by the Act 29 Vict., ch. 32, sec. 3, it was enacted: "No Decree Nisi for a divorce shall be made absolute until after the Expiration of Six Calendar Months from the pronouncing thereof, unless the Court under the Power now vested in it fix a shorter Time." The last mentioned Act was in force in 1870; and the contention is that the Dominion Act of 1930 brought it into force in Ontario, and that it overrides both Rule 18 and the Ontario Statute (R.S.O. 1937, ch. 208, sec. 7) which confirmed it (or Rule 16 of the Rules of 1933 which was in the same words), and declared it to have the same force and effect as if embodied in the statute itself.

Before deciding that the Dominion statute overrode or rendered invalid the Ontario statute, it would be necessary, I think, to cause notice to be given to the Attorney-General for Canada and the Attorney-General of Ontario, pursuant to sec. 32 of The Judicature Act; and it would be necessary also to consider whether any purported exercise by Parliament of the power to regulate procedure in actions for the annulment of marriage could be effective in the face of the exclusive power of the Legislature under sec. 92 of The British North America Act to make laws in relation to the organization of provincial courts, including procedure in civil matters in those courts; and in addition to that constitutional question it would be necessary to consider whether a Judge sitting in Single Court can vary the judgment nisi pronounced by another Judge at the trial, which judgment nisi orders and adjudges that the marriage be dissolved unless cause be shown within six months (cf. *Fitzgerald v. Fitzgerald* (1874), L.R. 3 P. & D. 136). However, in my opinion, none of those questions need to be considered, because my opinion is that the Dominion statute does not profess to bring into force in Ontario the Imperial statute of 1866.

The question as to what, precisely, was introduced into Ontario in 1930 has engaged the attention of Judges in Ontario almost from the time of the passing of the Act of 1930. Logie J. referred to it in *Walker v. Walker*, [1932] O.R. 69; Middleton J.A. dealt with it in *H. v. H.*, [1933] O.W.N. 490; and it was before the Court of Appeal in *Howe v. Howe*, [1937] O.R. 57. The last mentioned case is clear authority for the drawing of a sharp distinction between the "law of England," which was introduced into Ontario, and the practice in England, which

was not introduced. It is true that neither in *H. v. H.* nor in *Howe v. Howe* did the Court have to consider whether an English statute in force in 1870 and regulating procedure only was part of the "law" introduced into Ontario; but when once it is granted that it was the substantive law that was introduced, i.e., the law defining the grounds upon which a dissolution of marriage may be decreed or denied, and not the mere practice, I think the conclusion is inevitable that the practice is not introduced even if the practice rests upon statute. To direct that there shall be two steps in the process of dissolving a marriage, the first the pronouncing of a judgment nisi, and the second the pronouncing of a judgment absolute, and that the second step shall not be taken until a certain time from the taking of the first step has elapsed, is a mere matter of procedure having nothing whatever to do with the duty of the Court to grant, or the right of the Court to refuse, the dissolution of a marriage. By the Dominion Act the right of aggrieved spouses to have their marriage dissolved upon proof of certain facts is established, subject to the right of the Court to refuse the decree upon certain grounds; but the administration of the law so introduced is left to the Court, and the Court in administering that law must of necessity proceed in accordance with its own practice however established.

For these reasons my opinion is that the motion cannot be entertained and must be dismissed.

Motion dismissed.

[COURT OF APPEAL.]

**Re International Metal Industries Ltd.
and the City of Toronto.**

Assessment and Taxation—Business and income assessment—Appeal to Court of Appeal from order of The Ontario Municipal Board—Jurisdiction of Court of Appeal—Findings by Board that appellant company did not carry on any business at premises in question—Whether certain income was derived from any business carried on at the premises—No questions of law involved—The Assessment Act, R.S.O. 1937, ch. 272, secs. 8(1) (k), 9, and 84(6).

The appellant company occupied under lease a room in a building in the City of Toronto. The appellant company received during a taxation year certain sums of money representing interest charges on loans to a subsidiary company and also items from a subsidiary company called management and engineering fees.

By sec. 9(1) of The Assessment Act, R.S.O. 1937, ch. 272, subject to certain exceptions, every corporation not liable to business assessment under sec. 8 shall be assessed in respect of income, and every corporation, although liable to business assessment under sec. 8, shall also be assessed in respect of any income not derived from the business in respect of which it is assessable under that section.

By an order of the Ontario Municipal Board the appellant company was found not liable for business assessment under sec. 8 of the Act, but liable for income assessment under sec. 9(1)(a) of the Act on all the moneys in question received by it. In reaching its conclusion the Ontario Municipal Board found as facts (1) that the appellant company was not carrying on any business at the premises in question, (2) that even if the appellant company was carrying on business at the premises in question and therefore properly subject to a business assessment, the item received by it representing interest charges on loans to its subsidiary company was not income derived from the business in respect of which the company was assessable under sec. 8 of the Act.

The appellant company appealed to the Court of Appeal from the order of the Ontario Municipal Board.

Held that the order of the Ontario Municipal Board was founded upon findings of fact and therefore no appeal lies to the Court of Appeal, the jurisdiction of the Court of Appeal being limited by sec. 84(6) of The Assessment Act to appeals from decisions of the Board upon questions of law or the construction of a statute, by-law, agreement in writing or order of the Board.

AN appeal by International Metal Industries Ltd. from an order of The Ontario Municipal Board finding the appellant company not liable for business assessment under sec. 8 of The Assessment Act, R.S.O. 1937, ch. 272, but liable for income assessment under sec. 9(1) (a) of the Act.

The facts are stated in the reasons for judgment of Gillanders J.A. (*infra*). A preliminary objection was raised by the respondent as to the jurisdiction of the Court to entertain the appeal.

May 10th, 1940. The appeal was heard by RIDDELL, HENDERSON and GILLANDERS JJ.A.

H. C. Walker, K.C., for International Metal Industries Ltd., appellant.

J. P. Kent, K.C., for The City of Toronto, respondent.

May 21st, 1940. RIDDELL J.A.:—I had read the proceedings below and carefully considered them in connection with the relevant cases in Stroud's Judicial Dictionary and "Words and Phrases," and could find nothing to complain of in the judgment appealed from either on principle or on authority, and was about to write a judgment in that sense, when the judgment of my brother Henderson was placed in my hands. Concurring as I do in everything in that judgment, I think it unnecessary to add anything. The appeal must be dismissed with costs.

HENDERSON J.A.:—An appeal from an order of the Ontario Municipal Board, dated the 13th December, 1939, dismissing an appeal from His Honour Judge Parker, dated the 14th day of September, 1939, who dismissed the appeal of the appellant from the decision of the Court of Revision of the City of Toronto, which confirmed the amount of the taxable income of the appellant for the year 1938 at the sum of \$63,829.07.

In addition to dismissing the appeal, the Ontario Municipal Board on the application of the respondent allowed the whole matter of the assessment to be opened and fixed the taxable income of the appellant for the year 1938 at the sum of \$153,829.

The appellant controls and owns nine subsidiary companies, five of which are in Canada and four in the United States. The appellant Company leases a room 9 feet by 24 feet from its Canadian subsidiary, Service Station Equipment Company Limited at 101 Hanson Street in the City of Toronto.

The respondent assessed the appellant for income assessment pursuant to sec. 9(1) (b) of The Assessment Act, in the sum of \$63,829.07 made up as follows:

Receipt of interest charges on loans to John Wood Manufacturing Company of Pennsylvania, one of its subsidiaries	\$60,871.41
Receipt of dividends and interest earned on investments	2,876.43
Receipt of interest on mortgages	1,581.23
	<hr/>
	65,329.07

Less Statutory Exemption	\$ 1,500.00
Total	\$63,829.07

His Honour Judge Parker dismissed the appeal from the Court of Revision agreeing with the appellant's contention that it is liable under the provisions of sec. 8 of The Assessment Act to business assessment of the one-roomed premises mentioned but agreeing in effect with the respondent that the assessment as made was on income not derived from the business in respect of which it is assessable under that section, and as such liable to assessment pursuant to the provisions of sec. 9(1) (b) of The Assessment Act. I quote from the reasons of the Ontario Municipal Board the following extracts:

"The Board must first deal with the question of whether or not the appellant company is carrying on business within the meaning of sec. 8(1) (k) of 'The Assessment Act' and accordingly liable to be assessed for business for a sum equal to 25 per cent. of the assessed value of the premises. It is agreed that the one room in question would have an assessment of approximately \$1,000.00, 25 per cent. of which would be \$250.00.

"The members of the Board in coming to a conclusion, have had the privilege of listening to explanation of the company's activities by counsel, have heard the evidence given by two witnesses for the appellant, W. J. Wesley, Secretary-Treasurer, and Comptroller of the company, and T. H. Gibson, Assistant Secretary of the appellant company, have examined the exhibits filed before His Honour Judge Parker which were filed with the Board at the present hearing, and the Board has also had the privilege of reading a transcript of the evidence taken before His Honour Judge Parker, on June 29th of this year, also filed as an exhibit before the Board.

"Counsel for the appellant contended that the business carried on is that of managing, operating and controlling subsidiary companies. The claim for existence of such business of operating, managing and controlling being carried on in the premises in question, appears to be based upon the activities of one J. B. Balmer, a director and general manager of the Canadian subsidiaries, and who is the individual alleged to be occupying the premises."

The Board in its reasons then gives a list of the directors and officers of the appellant, and the various subsidiary companies, and proceeds:

"The following questions by counsel and answers by the witness Gibson before His Honour Judge Parker, are significant:

Q. What do those premises consist of? A. They consist of Mr. Balmer's office and the secretary's office.

Q. Who is Mr. Balmer? A. Mr. Balmer is the Canadian general manager of International Metal Industries, and a director of that company.

Q. And as Canadian general manager of International Metal Industries Limited what are his duties? A. To generally supervise and co-ordinate the work of the various subsidiary companies, to assist in carrying out the instructions of his President and Board of Directors of the parent company.

Q. Now, regarding Mr. Balmer who you have told us occupies as his office the premises covered by the lease, exhibit one, what does Mr. Balmer do? What are his duties? A. His duties are to manage and supervise these various companies.

Q. And how does he do that? A. He does that through his contact, his supervision of the plant managers and through reports to him from the managers, and of course from myself on the other end of the business, the financial end.

Q. Then, he receives these reports and then if there is a condition—we will say Service Station Equipment Company Limited plant; that is one of the Toronto plants? A. Yes.

Q. A condition which he thinks requires some attention what would he do? A. Why he would call in the plant superintendent, or if it was the sales manager call in the sales manager, or an accounting matter he would call in me probably, and straighten it out.

Q. Are there any records of the company kept in this office? A. Yes, accounting records, dividend records, minute books, all contracts.

BY THE COURT: Q. Accounting records; what else? A. Dividend records, shareholders' lists as we receive them from the trust company, from the registrars, all minute books, general contracts and agreements.

Witness Gibson cross-examined by counsel for the respondent:

Q. Mr. Gibson, the parent company, International Metal Industries, do not do any manufacturing themselves? A. Not as a company.

Q. They have no other space except this office which is approximately what size? A. Oh, I have forgotten the exact measurements. I think it is about 40 x 11 or 12.

Mr. Mockridge: The lease says 9 x 24.

BY MR. KENT: Q. So that any business this company does actually is done—that is the space it occupies? A. No, I do not think you can say that, Mr. Kent, exactly. These are Mr. Balmer's offices, but for instance, I do a great deal of work for International Metal Industries, and it is done through the Toronto office in general.

Q. Alright. Then, their work is more in the nature of checking up these various companies you are speaking of? A. Well, when I said that to Mr. Mockridge it occurred to me I should have said Mr. Balmer does a certain amount of work such as locating new products for the various companies, and perhaps he might make a sales contact for a special line.

Q. What is Mr. Balmer in the Service Station Equipment Company? A. He is president of that company.

Q. President? A. He occupies that same position with all Canadian subsidiary companies.

Q. As to each of these companies then he is president? A. Yes.

Q. Has he any other position in the Company? A. He is a director, no other official position.

Q. And has each of these companies a manager? A. They have. I think they are called sales managers as a rule.

Q. Sales managers? A. Yes.

Q. All directly under Mr. Balmer? A. Yes.

Q. Mr. Balmer is merely in the position of being manager of each of these companies? A. Yes.

“The evidence before the Board was substantially the same and the Board views as significant the fact that the answers of the witness, Gibson, given in outlining the said Balmer's duties could very well have been given to questions regarding Balmer's function as president of each of the Canadian subsidiary companies, and in fact it appears to the Board that the witness had in mind when making such answers, the said Balmer exercising functions as the president of each Canadian

subsidiary, and not as a general manager of the Canadian subsidiaries, exercising independent discretion.

"There was no evidence tendered before the Board to show that any control or direction of any kind over the American subsidiaries emanated from the premises in question, and furthermore the minute book of the John Wood Manufacturing Company, Incorporated, shows that at a special meeting of the stockholders held on July 14th, 1934, By-law Number 12 was amended to read as follows:

" 'The property and business of this corporation shall be managed by its board of directors which shall consist of such number of directors, not exceeding eight and not less than three, as the stockholders may deem advisable to elect. Directors need not be stockholders. They shall be elected at the annual meeting of the stockholders and each director shall be elected to serve until his successor shall be elected and duly qualified.' "

"In any event while it may be quite true that Balmer, when in the premises did communicate with officials of the Canadian subsidiary companies, the Board, with respect to the learned County Court Judge, has failed to see any evidence tending to establish the existence of any business of the appellant. It would appear to the Board that any business which is carried on in the ordinary meaning of the term at the building at 101 Hanson Street, is business carried on by the subsidiary company, Service Station Equipment Company, Limited, and those other Canadian subsidiaries which occupy the premises at 101 Hanson Street.

"The business of managing, controlling and operating subsidiary companies is not one mentioned in subsec. 8 of 'The Assessment Act', but counsel for the appellant contended that such business, if any such business was in existence, would come under the heading of 'any business not before in this section or in clause "1" especially mentioned.' Upon careful consideration of all of the evidence, the Board is unable to find that the appellant company is carrying on any business at the premises leased by it from its Canadian subsidiary at 101 Hanson Street, and finds as a fact that the appellant is not carrying on any business at the said premises within the meaning of sec. 8(1) (k) of 'The Assessment Act' and therefore is not liable to business assessment thereunder."

The jurisdiction of this Court on appeal from the orders of the Ontario Municipal Board is limited to consideration of questions of law, and in my view the Board's order in this case is founded upon the findings of fact which I have quoted founded on the evidence before it.

I think this case falls within the judgment of this Court in *Re the City of Toronto and the Famous Players Canadian Corporation Limited*, [1935] O.R. 314, and I would also refer to *The Corporation of the Township of Tisdale and Hollinger Consolidated Gold Mines Limited*, [1933] S.C.R. 321.

I think, therefore, the appeal must be dismissed with costs.

GILLANDERS J.A.:—An appeal from a judgment of the Ontario Municipal Board finding the appellant company not liable to business assessment under the Assessment Act, R.S.O. 1937, ch. 272, sec. 8, but liable to be assessed in respect of income under sec. 9(1) (a) of this Act.

The appellant company completely owns (except for qualifying shares) five Canadian subsidiary companies and one American subsidiary. The wholly owned American subsidiary has in turn three wholly owned subsidiaries in the United States. The subsidiaries are actively engaged in manufacturing and/or selling several lines of merchandise in Canada and the United States. The president, vice-president, secretary and assistant secretary of each of the five Canadian subsidiaries are the same persons who are all officers and members of the Board of the parent appellant company. There is also interlocking between the boards of the appellant company and the American subsidiaries, —both with the one directly controlled and those indirectly controlled. The appellant company leases and occupies from one of its Canadian subsidiaries at 101 Hanson Street, Toronto, a room or office some 9 feet by 24 feet occupied by the appellant company's Canadian general-manager and several other employees. The appellant company is not a manufacturing or sales company but claims to be occupying and using the premises leased by it from its subsidiary for the purpose of actively carrying on the business of managing, operating and controlling its subsidiary companies, and that under the Assessment Act, sec. 8, while it is liable to business assessment on the premises so occupied and used (it is stated the premises would have an assessment of approximately \$1,000 and that under sec. 8(1) (k)

should be assessed for business assessment at 25 per cent. of such amount) it would, being so liable to business assessment and its income it is urged being derived from the business so carried on, not be liable to be assessed for income in respect of the items in question in this appeal.

The respondent city assessed the appellant pursuant to sec. 9(1)(b) of the Assessment Act for income in respect to two small items which are not in dispute, and in respect of an amount of \$60,871.41, being interest received by the appellant on a loan or loans to its wholly owned and directly controlled American subsidiary. In appealing to the County Judge from this assessment the appellant contended that this item of \$60,871.41 is income derived from its business and that it is therefore not liable to be assessed for income thereon. The learned County Court Judge dismissed the appeal as to this item of interest, holding that, although the appellant is liable to business assessment on the premises it occupies, this item is assessable as income under sec. 9(1)(b) of the Assessment Act, following the decision in *City of Toronto v. John Northway & Son* (1923), 54 O.L.R. 81.

From this decision the appellant company appealed to the Ontario Municipal Board and on that appeal counsel for the respondent asked that the whole question of the appellant's assessment be reopened in pursuance of the provisions of sec. 86 of the Assessment Act, and urged,

"1. The appellant company is not liable to business assessment in that it cannot qualify for any of the categories mentioned in sec. 8 of 'The Assessment Act' including (1)(k), and accordingly by virtue of sec. 9(1)(a) of 'The Assessment Act', is liable to income assessment.

"2. That the income assessment should include not only the present items in the assessment as made, but in addition two items of \$75,000 and \$15,000 which were received by the appellant company from the American subsidiary, John Wood Manufacturing Co. Inc., which it claimed to be in payment of an engineering fee and in payment of a management fee respectively.

"3. In the alternative, if it should be held that the appellant company is liable for business assessment under sec. 8(1)(k), that not only the present assessment composed of the three items above recited should be confirmed as being items 'in re-

spect of any income not derived from the business in which it is assessable under that section' pursuant to sec. 9 of 'The Assessment Act', but that in addition the two items of 75,000 and \$15,000 which were received by the appellant from the American subsidiary, John Wood Manufacturing Company, also should be included in the assessment."

After a consideration of the evidence adduced, the exhibits filed and submissions tendered, the Board gave effect to the request and the submissions of counsel for the respondent, and by its judgment finds and directs that the appellant company be assessed in respect of income not only on the item of \$60,-871.41 representing interest charges received by it on loans to its American subsidiary, but also on (a) an item of \$15,000 received from its wholly owned and directly controlled American subsidiary, as a management fee, and (b) an item of \$75,000 received from the same subsidiary and said to be an engineering fee. From this judgment the appellant appeals to this Court.

Preliminary objection was taken by counsel for the respondent that no appeal lies in that the question involved is a question of fact and does not come within the provisions of sec. 84(6). Appellant's counsel on the other hand urges that the issues in the appeal involve the construction of sec. 8(1) of the Act and are therefore properly before and should be considered by this Court.

The question whether the matters involved were questions of fact or questions of law, coming within the provisions of the Act where an appeal lies to this Court, has been the subject of considerable judicial discussion in other cases. Before considering the question in this case reference may conveniently be made to several of these.

In *McIntyre Porcupine Mines Limited and Morgan* (1921), 49 O.L.R. 214, Mr. Justice Hodgins says in part:

"It is only upon questions of law that an appeal lies to this Court; and, while care should be taken not to trench upon the final authority of the Board upon questions of fact, it is equally important that the limited right of review should not be ignored or diminished.

"The construction of the words of any statutory enactment is a question of law, while the question of whether the particular matter or thing is of such a nature or kind as to fall within the legal definition of its terms is a question of fact: *Elliott v. South*

Devon R.W. Co. (1848), 2 Ex. 725; *Attorney-General for Canada v. Ritchie Contracting and Supply Co.*, [1919] A.C. 999, 48 D.L.R. 147. This distinction clearly runs through the decision of this Court in *Re Hiram Walker & Sons Limited and Town of Walkerville* (1917), 40 O.L.R. 154, where it is said (p. 156): "The case was argued by Mr. Anglin as if the legislation imposed taxation in respect of a 'distillery'. The question in such a case would be a very different one from that which arises when the taxation is in respect of 'the business of a distiller'. The Court cannot, I think, know judicially what such a business is, and the question of what it is must therefore be a question of fact."

"The case just quoted is in line with the decision, upon somewhat similar words, in *Re S. H. Knox & Co. Assessment* (1909), 18 O.L.R. 645. It is no doubt difficult to separate questions of law and fact in a case of this kind, where evidence which enables the Court to put itself in a position to construe the words of the Act is very often the same or practically the same as that which determines whether the statute covers the particular thing in question. But that is no reason for confusing two separate matters, in one of which an appeal lies and in the other the decision of the Board is final. See *Re Bruce Mines Limited and Town of Bruce Mines*, 20 O.L.R. 315, and the dissenting judgment of Meredith J.A. in *Re S. H. Knox & Co. Assessment*, *supra*."

In *Re City of Hamilton and Birge* (1924), 55 O.L.R. 448, in considering the question involved in that case whether Mr. Birge's "residence" was or was not in the City, Mr. Justice Masten, holding that the point was a question of law, adopts the remarks of Avory J. in *Stoke-on-Trent Borough Council v. Cheshire County Council*, [1915] 3 K.B. 699, at pages 706 and 707.

In *The Municipal Corporation of the Township of Tisdale and Hollinger Consolidated Gold Mines Limited*, [1933] S.C.R. 321, at 325, Cannon J. says:

"The question as to whether the properties assessed or on which the buildings, plant and machinery are found are 'mineral lands' is one of fact, as well as that whether or not any particular substance is a 'mineral' within the meaning of the statute in which the word is used, there being no definition in the Act. (*Union Natural Gas Company of Canada v. Corporation of the*

Township of Dover, 60 S.C.R. 640, at p. 642). We agree with the late Mr. Justice Grant of the Appellate Division, when he says:

“Upon the evidence which was adduced, and upon the findings made by the Ontario Railway and Municipal Board, it appears to me quite clear that the Board must be taken to have decided that the lands in question were mineral lands, within the meaning of sec. 40, subsec. 4; and as their finding in that regard is one of fact, this Court is precluded from interfering therewith.”

And in *The Matter of a Reference Concerning the Jurisdiction of The Tariff Board of Canada*, [1934] S.C.R. 538, at p. 548, Mr. Justice Rinfret deals with the argument of counsel in that case that the Tariff Board, in making decisions as to value and as to the rate of duty applicable under the law, as a necessary consequence must determine the question of law which such decisions call for, and says:

“It is obvious, however, that the same remark may equally be made of the local appraisers or of the collectors, when they are called upon to ascertain, estimate and appraise the true and fair market value of goods. In that connection, the local appraisers, when giving their decision, are exactly on a par with the Dominion appraiser or the Board. They also, before making their appraisal, must form an opinion as to the relevant law. But, whatever incidental conclusions the appraisers or the Board must come to in order to arrive at a decision on the proper appraisal to be made, the decision of each or either of them is nothing but the finding of a fact in the particular case: *Girls Public Day School Trust Ltd. v. Ereaut*, [1931] A.C. 12.”

A recent case where this question was discussed by this Court is *Re The City of Toronto and The Famous Players Canadian Corporation Limited*, [1935] O.R. 314. Mr. Justice Middleton on the facts of that case says in part:

“It is a question of law whether the income derived from the stock held in these subsidiary and allied companies is assessable at all. The question whether the income is or is not received is a question of fact.”

He was of opinion in that case that the question involved was one of law. Mr. Justice Masten, with whose opinion the majority of the Court agreed, was of opinion that no appeal lay. He says in part:

"A determination of the nature of the respondent's business is *prima facie* a question of fact. Circumstances may exist where it involves a question of law, but here it seems to me to depend on whether the various subsidiary corporations are independent personalities, or are mere agents controlled as such by the respondent company for the carrying on of its own business. That appears to me to be a question dependent solely on the facts adduced in evidence.

"The further question whether the income proposed to be assessed is derived from the business so carried on in the premises liable to business assessment, or whether it is derived from independent sources outside that business, seems to me to be plainly a question of fact and not of law."

Passing to the case at bar the Municipal Board after consideration and discussion of the material before it, and arguments submitted, said in part:

"The Board . . . has failed to see any evidence tending to establish the existence of any business of the appellant. It would appear to the Board that any business which is carried on in the ordinary meaning of the term at the building at 101 Hanson Street, is business carried on by the subsidiary company, Service Station Equipment Company, Limited, and those other Canadian subsidiaries which occupy the premises at 101 Hanson Street.

"The business of managing, controlling and operating subsidiary companies is not one mentioned in subsec. 8 of 'The Assessment Act', but counsel for the appellant contended that such business, if any such business was in existence, would come under the heading of 'any business not before in this section or in clause "1" especially mentioned.' Upon careful consideration of all of the evidence, the Board is unable to find that the appellant company is carrying on any business at the premises leased by it from its Canadian subsidiary at 101 Hanson Street, and finds as a fact that the appellant is not carrying on any business at the said premises within the meaning of sec. 8(1)(k) of 'The Assessment Act' and therefore is not liable to business assessment thereunder."

The Board's judgment further proceeds:

"The Board having found that the appellant should not be assessed for business assessment, the second point raised by the appellant automatically fails as sec. 9(1)(b) of 'The Assess-

ment' is applicable only to companies which are liable to business assessment. The Board wishes to state, however, that even if it had been able to find that the appellant company was properly subject to a business assessment, it would have felt it proper to dismiss the appeal on the ground that the item of \$60,871.41 was income not derived from the business in respect of which the company was assessable under sec. 8. The item was loan interest paid by the American subsidiary, John Wood Manufacturing Company, Incorporated, and there was no evidence of any kind to show that the said item was income derived from any business that might have been carried on in the appellant's office at 101 Hanson Street."

Before this Court counsel for the respondent did not contend that the business of managing, operating and controlling companies or subsidiary companies could not be a business properly assessable under sec. 8(1) (k) of the Assessment Act, but relies on the finding of the Municipal Board as expressed above that the appellant company in this case (1) is not in fact carrying on any business at the premises in question, (2) the opinion of the Board that, even if it were able to find the appellant company properly subject to business assessment, it would give effect to the respondent's contention and hold that the items in question were not income derived from the business of the company.

Had the matter turned on the question as to whether or not managing, operating and controlling subsidiary companies may be a business in respect of which a person may occupy or use land and be liable to assessment under sec. 8 of the Act, and I would think under proper circumstances it well might be, I would consider the matter a question of law involving as it would construction of the statute as to whether or not it included as a business the particular activities of the appellant company. But in this case that is not the question involved. The Municipal Board is unable to find that the appellant company is carrying on business at the premises in question. That to my mind, in view of the decisions, is a question of fact, and the matter is therefore concluded by the Board's finding. So also is the question as to whether the income proposed to be assessed is derived from the business or whether it is derived from independent sources outside the business, and the Board having expressed the opinion that there was no evidence to show that the item of \$60,871.41 is derived from any business carried on

in the appellant's office at 101 Hanson Street, and as to the additional items of \$75,000 and \$15,000 that these items of income were arbitrarily allowed under the headings indicated also is a finding of fact.

For these reasons I am of opinion that effect must be given to the preliminary objection raised by the respondent and that the appeal should therefore be dismissed with costs.

Appeal dismissed with costs.

[ROACH J.]

J. v. J.

Husband and wife—Action for annulment of marriage—Refusal by defendant wife to consummate the marriage—Action commenced 31 years after date of marriage—Approbation of the marriage by the husband—Lapse of time.

In this action the plaintiff claimed a declaration that his marriage with the defendant was null and void on the ground that the defendant wife was incapable of consummating the marriage.

The parties were married in 1909 and resided together in their own home until 1935 to all outward appearances in the same way that normal married persons live together. In 1935 the defendant wife left the plaintiff's residence and the parties have not lived together since that date.

In 1936 the wife commenced an action against the plaintiff for alimony and in that action the husband pleaded, *inter alia*, that his wife had not consummated the marriage. The wife's action for alimony was dismissed on the ground that the husband had not deserted her and had not been guilty of cruelty.

Subsequently in 1939 the defendant wife brought a second action for alimony against the husband who again raised, *inter alia*, the defence that his wife had not consummated the marriage. This action for alimony was also dismissed. In both the alimony actions the husband merely asked that the actions be dismissed and he did not counterclaim for any relief as to the validity of the marriage.

Held (1) on the evidence the defendant wife was incapable of consummating the marriage;

(2) However the husband's claim for a declaration as to nullity of the marriage should be dismissed because he must be taken to have acquiesced in the condition on which he now founds a claim for relief; he approbated the marriage which he now seeks to be rid of and in the circumstances it would be contrary to public policy to grant the declaration. There is nothing in the nature of a limitation period within which a declaration of nullity of marriage may be made and after which it must be refused. The law affords a remedy to those who are really aggrieved and sensible of the grievance. But if a husband is silent for so long a period as in this case unaccounted for the presumption would necessarily arise that he acquiesced in the consequences. He is not entitled to say "give me a remedy for a grievance I have not felt" and that to the detriment of the other: *B-N. v. B-N.* (1854), 1 Spinks (Ecc. & Ad.) 248 and *B. v. B.*, [1935] S.C.R. 231, applied.

AN action by a husband against his wife for a declaration that their marriage is null and void on the ground that the defendant wife is incapable of consummating the marriage.

The action was tried by ROACH J., without a jury, at Toronto. *L. S. Eckardt*, for the plaintiff (the husband).

E. W. Rush, K.C., and *H. Freshman*, for the defendant (the wife).

June 1st, 1940. ROACH J.:—The plaintiff and defendant are husband and wife. They were married in Toronto on June 18, 1909, each being then about 21 years of age. They resided together in their own home in the City of Hamilton until 1935, to all outward appearances in the same way that normal married persons live together. They separated in September 1935, and have not lived under the same roof since that time.

The plaintiff now brings this action asking a declaration that the said marriage be declared null and void on the ground that the defendant has been and is incapable of consummating the marriage. The wife counterclaims for alimony.

There is absolutely no doubt that the marriage has not been consummated. During the course of this trial counsel for the defendant so admitted. There is likewise no doubt that this has been due entirely to the fault of the defendant. The plaintiff has stated in evidence, and I have no hesitation in believing him, that times without number, while living with the defendant, he sought to consummate the marriage, but the defendant steadfastly refused to permit him to do so; that she always complained that she had some physical defect; that on many occasions he pleaded with her to submit to a medical examination and she always refused; that on one occasion, in 1913 or 1914, he actually brought a doctor to their home for that purpose and the defendant refused to permit the doctor to examine her, and when the plaintiff attempted reasonably to persuade her she went out of the house and would not return until the doctor had departed; that again in 1921 or 1922, at a time when she was suffering from a broken leg, he took her to a doctor to have the leg X-rayed and while there requested her to allow the doctor to examine her and she refused on the pretext that it would be too expensive; that on occasions he became unusually insistent in his demand for sexual intercourse, or as he put it, he went as far as he could short of being brutal, and on those

occasions and one occasion when he was less insistent she became hysterical and rushed out of the room and sometimes went outside.

The law is well settled that where there is persistent and wilful refusal on the part of a party to a marriage to have it consummated, and where there is also refusal by such party to submit to medical examination, an inference is raised of incapacity arising from some abnormal condition of mind or body upon which the Court may grant a decree annulling the marriage: *Szregher v. Szregher*, [1936] O.R. 250.

The facts in the case at bar come squarely within the rule of law above stated.

The more difficult legal problem arises in the circumstances of this case, namely, has the husband by his long forbearance or inertness and delay acquiesced in the condition of which he now complains, so as to be estopped from relying upon that condition as entitling him to the relief now sought?

In *Lewis (falsely called "Hayward") v. Hayward* (1866), 35 L.J. (P. & M.) 105, the House of Lords, reversing the decree of the Judge Ordinary, granted the petition of the plaintiff wife for a declaration of nullity of her marriage after fourteen years of cohabitation on the ground of the husband's impotence.

In *Mansfield (falsely called "Cuno") v. Cuno* (1874), 42 L.J. (P. & M.) 65, the marriage was in 1863, and the parties separated in 1870, and in 1871 the wife petitioned the Court for a declaration of nullity on the ground of the husband's impotence. The petition was refused because the medical evidence was inconclusive and the evidence of the parties conflicting, but Lord Chelmsford, commenting on the delay, had this to say, "I am clearly of opinion that delay, however long continued, can be no bar to a proceeding of this description, provided the case is clearly proved on the part of the person complaining."

In *S. v. B.* (1905), 21 T.L.R. 219, the Court granted a decree of nullity on the ground of incapacity of the wife notwithstanding that the spouses had lived together for 17 years after the date of the marriage.

In *B-N. v. B-N.* (1854), 1 Spinks (Ecc. & Ad.) 248, 26 Eng. Rep. 144, the Privy Council stated the law in cases of this kind to be as follows:

(1) That time alone will not, but, coupled with other facts proving insincerity, will operate as a bar to such a suit.

(2) That lapse of time must be accounted for.

In that case the parties were married in June 1835; they lived together in the East Indies till June 1840, when the wife returned to England for the benefit of her health; the husband remained in the East Indies where he was employed in the civil service of the East India Company, until March 1844, when he returned to England and immediately rejoined his wife, and they lived together until 1845, when they finally separated. The husband commenced his suit for a declaration of nullity in September 1852. Dr. Lushington delivered the judgment of their Lordships and at p. 262 (1 Spinks) he makes the following further findings of fact, and declares the result which in law follows:

“As regards the question of time and knowledge of the the defect now complained of, it is pleaded by Mr. B. in the libel, and therefore admitted as against him, that very soon after the marriage he became aware that his wife was incapable of sexual intercourse, but he denies that he knew that the defect, whatever it might be, was incapable of cure. Now during the cohabitation in India which lasted from 1835 till 1840, there might have been more difficulty in obtaining adequate medical advice on such a matter; so far, however, as we have evidence, there does not appear any proof that Mr. B. was cognizant of that of which he now complains, and certainly made no attempt to ascertain the real state of the cause. For this inertness there may be some cause, but when the parties were in England and the cohabitation recommenced in 1844, there no longer existed any reason why medical assistance was not resorted to, and the fact both of the impediment to consummation and the incapability of cure distinctly ascertained; but here again there is not the least evidence of any proceeding on the part of Mr. B. On the contrary the cohabitation ceases, and a separation is agreed upon for reasons wholly different. Mr. B. does not pretend that this separation was on account of the corporeal defect of his wife, nor could it be because he discovered it to be incurable, for that he says he did not discover till 1852. In short, that so far as the lapse of time is an important consideration to these cases, Mr. B. has by no means satisfactorily accounted for the long delay in bringing this suit.”

And at p. 260 the judgment further states the legal principle in these words: “The law affords a remedy to those who are really aggrieved and sensible of the grievance and then only

vigilantibus non dormientibus. The remedy is given on account of the loss sustained and the evil felt, not to promote or assist other purposes having no relation to it. If the husband is silent for so long a period, unaccounted for, that the presumption would necessarily arise that he acquiesced in the consequences which such an unfortunate connection entailed upon him, he could hardly be entitled to say, 'Give me a remedy for a grievance I have not felt,' and that to the detriment of the other."

In *W. v. R.* (1876), 1 P.D. 405, at p. 408, Sir R. Phillimore has earlier said: "The law has always required sincerity in the complainer, that is, a real sense of the grievance complained of unmixed with any other subsidiary motive, and as a necessary proof of such sincerity has also required all reasonable promptitude to be exhibited by the complainer in seeking legal redress."

This "doctrine of sincerity" was discussed in a judgment of the Privy Council in *G. v. M.* (1885), 10 App. Cas. 171, and at p. 186 the Earl of Selborne L.C. said: "... I think I can perceive that the real basis of reasoning which underlies that phraseology is this, and nothing more than this, that there may be conduct on the part of the person seeking this remedy, which ought to estop that person from having it; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed. Well now, that explanation can be referred to known principles of equitable, and, I may say, general jurisprudence. The circumstances which may justify it are various, and in cases of this kind many sorts of conduct might exist, taking pecuniary benefits, for example, living for a long time together in the same house or family with the status and character of husband and wife, after knowledge of everything which it is material to know. I do not at all mean to say that there may not be other circumstances which would produce the same effect."

It will thus be seen that there has not been established by precedent anything in the nature of a limitation period within which the declaration may be made and after which it must be refused. Accordingly, the mere fact, standing by itself, that in

one case the declaration was made after a lapse of fourteen years, e.g., the *Hayward* case (*supra*) or in another case after the lapse of seventeen years, is of no legal consequence. If the law of England had been that declared by the Privy Council in *B-N. v. B-N.* (*supra*) then it must be assumed that in every other case it was the Court's opinion that the lapse of time had been satisfactorily accounted for.

The Supreme Court of Canada in *B. v. B.*, [1935] S.C.R. 231, followed the law as declared in *B-N. v. B-N.* (*supra*) and in *G. v. M.* (*supra*), and refused a declaration of nullity after a lapse of eight years.

It becomes pertinent to consider certain other facts in the lives of the unfortunate couple in the case at bar.

On September 13th, 1935, the defendant left the plaintiff's residence and immediately had him summoned under the Deserted Wives' Maintenance Act. He appeared to the summons and after a trial before the Deputy Police Magistrate the charge against him was dismissed.

Immediately thereafter the defendant commenced an action against the plaintiff claiming alimony. The record in that action has been filed as an exhibit at this trial. In her statement of claim in that action the wife pleaded substantially as follows:

1. That she had always acted as a faithful and dutiful wife and had discharged all the duties of a wife toward him.
2. That she and her husband had lived and cohabited ever since their marriage, with the exception of three months which she spent in Toronto, until the 13th of September, 1935, when she left him because he threatened to kill her.
3. That since the year 1922 the husband had exhibited a violent temper and disposition against her, and had on a number of occasions used violence and cruelty on her, seriously impairing her mental and physical health, and causing her to fear for her life.

In his statement of defence the husband denied all the allegations of cruelty or misconduct, and alleged that she left his home without any cause or excuse. He alleged, and in my view this is particularly important, that ever since their marriage his wife had refused him his marital rights notwithstanding his continuous and frequent requests and advances, and that sexual

intercourse had never taken place between them. He asked only that the action be dismissed.

In her reply to the statement of defence she denied his allegations and specifically alleged that the failure to have sexual intercourse was due to ill health and physical disability on the part of the husband, and that she was always willing and ready and in proper physical health to give him his marital rights. She further alleges that prior to their marriage the husband exacted an agreement from her that there would be no children of the marriage and that subsequent to the marriage he never asked for his marital rights.

In a subsequent pleading the husband specifically denied the wife's allegations as above summarized.

On this state of the record the action came on for trial before Mr. Justice H. T. Kelly at Hamilton in February 1936, and he found the following facts on the issues therein raised:

1. That the allegations of cruelty and violence were unfounded.

2. That her allegations as to the husband's physical disability or ill health, and that he did not request sexual intercourse, and as to the alleged pre-nuptial agreement, and as to her willingness to give the husband his marital rights were "utterly and bare-facedly false in every respect."

3. That there had not been sexual intercourse between the parties, although the plaintiff had "persistently but unsuccessfully made demands therefor."

Accordingly the action was dismissed.

Then in September 1938 the wife commenced another action against her husband claiming alimony, on the ground of desertion. In her statement of claim she alleged that prior to the institution of the action she had requested the husband to "restore to her her rightful status as his wife" and in substance that she was willing to return and live with him as his wife, and that he refused to accept her or to maintain or support her.

By way of defence to that action the husband pleaded the judgment in the earlier action, and again specifically pleaded that the wife had refused to consummate the marriage and that she had left the plaintiff's residence without any cause and had deserted him. And again he satisfied himself by simply asking that the wife's action be dismissed.

On the state of that record that action was tried by Mr. Justice Henderson at Hamilton in January 1939, and he found the following facts on the issues therein raised:

1. That the husband had not deserted his wife, but that from the day of their marriage she deserted him.

2. That her offer to return to her husband and discharge the duties of a wife were the merest sham, and hypocrisy intended only to create a foundation for her action. Accordingly that action was dismissed.

Prior to the year 1930 the Courts of this Province had no jurisdiction to grant the plaintiff the relief which he now claims. See *Ranger v. Ranger* (1920), 18 O.W.N. 66, and *T. v. B.* (1907), 15 O.L.R. 224. Jurisdiction was conferred on the Courts of this Province by The Divorce Act (Ontario) 1930, 20-21 Geo. V, ch. 14 (Dom.), to dissolve a marriage or declare a marriage null and void.

However, prior to The Divorce Act (*supra*) the refusal of a wife to consummate a marriage was a valid defence to an action for alimony: *Synge v. Synge* (1900), 17 T.L.R. 718.

The plaintiff, if he felt aggrieved when he discovered that his wife would not consummate the marriage, had no remedy in our Courts. However, unless he preferred to acquiesce in the condition and circumstances in which he then found himself, he could have separated from his wife and not been liable to alimony on the ground of desertion.

Then, when our Courts acquired jurisdiction he made no attempt to invoke that jurisdiction and seek the relief which he now claims. I do not suggest that he could have succeeded in such an attempt. But he invokes that jurisdiction now. Why did he delay? More important is the fact that when he found himself before the Court, not by his own volition but dragged there by his wife, not once but twice, he raised the very issue in those two actions which he raises in the present action and in each of those two actions contented himself by simply asking that his wife's action against him be dismissed.

By his conduct he must be taken to have acquiesced in the condition on which he now founds his claim for relief. He has approbated the marriage which he now seeks to get rid of, and, in the circumstances, it would be contrary to public policy to grant the declaration for which he now asks.

Finally, why does he even now seek such a declaration? Is it by reason of his own sense of injury or "on account of the loss sustained and evil felt?" The answer is contained in the admission made by him during cross-examination, that his only reason for bringing this action, even now, is to prevent his wife from further harassing him.

The action is therefore dismissed with costs, and the counterclaim for alimony dismissed without costs.

Action dismissed with costs; counterclaim dismissed with costs.

[ROACH J.]

Frind v. Sheppard.

Maintenance—Solicitors—Negligence—Proof of special damage in action for maintenance.

The right to recover in an action for maintenance is confined to cases where a person improperly and for the purpose of stirring up litigation and strife encourages others either to bring actions or to make defences which they have no right to make. An action for maintenance can be sustained only if special damage has been occasioned to the plaintiff by the maintenance. The action for maintenance at common law is not an action for the invasion of a right but is an action in respect of an offence which causes damage to the plaintiff; and it cannot be regarded as damage sufficient to maintain such an action that the plaintiff has had to discharge his legal obligations or that he has incurred expenses in endeavouring to evade them.

AN action by Max Arno Frind against Ross Sheppard for damages for negligence and maintenance.

The action was tried by ROACH J., without a jury, at Toronto.

A. C. Heighington, K.C., and E. F. Singer, K.C., for the plaintiff.

T. N. Phelan, K.C., for the defendant.

June 1st, 1940. ROACH J.:—The defendant is a barrister-at-law and solicitor practising in the City of Toronto. The plaintiff claims damages under two headings:

(1) For negligence in the performance of professional services rendered him by the defendant.

(2) For maintenance in an action in this Court in which the plaintiff herein was defendant.

The undisputed facts are as follows. The plaintiff, in contemplation of marriage, entered into a marriage contract with

his fiancée dated November 21, 1930. Under this contract, the plaintiff gave and granted to her by way of gift a house and lot in the Village of Lambton Mills in the Province of Ontario with all the necessary furniture for the said house. The plaintiff then married his fiancée at Montreal on December 11, 1930. They immediately came to Toronto, and on December 15, 1930, they separated and the wife returned to her father's home in Grand 'Mere, Quebec. The plaintiff consulted the defendant as his solicitor, and, as a result of some discussion between the plaintiff and his wife before she left him, the plaintiff and the defendant went to Grand 'Mere on December 22, 1930, and there, after some discussion between the plaintiff and his wife, her father, the defendant and a Quebec lawyer, two documents were signed: First—a power of attorney from the wife to her husband, enabling him to bar her dower in any of the husband's lands.

Second. A unique document signed by the plaintiff only and witnessed by the defendant. It is in the words following:—

“In the Matter of a Marriage Contract
Between

Max Arno Frind, of the City of Toronto,
the Party of the First Part,
and

Marcelle Colin Frind, wife of Max Arno Frind,
the Party of the Second Part.

In consideration of the party of the Second Part signing a power of attorney to bar her dower and releasing her interest in the marriage contract, the party of the First Part hereby consents and agrees that he will not oppose any application made to set aside the marriage between the parties hereto and will consent to an annulment or divorce, whichever is desired by the party of the Second Part.”

Both these documents were prepared by the defendant, as the plaintiff's solicitor, the first before they left Toronto and the second during the discussion in Grand 'Mere.

In the spring of 1931 and subsequently the wife attempted to bring about a reconciliation between herself and the plaintiff and offered to return and live with him as his wife, but the plaintiff spurned her offers.

On June 1, 1938, the wife commenced an action against the plaintiff in which she claimed *inter alia* a declaration that the marriage settlement was in full force and effect and certain relief to which she alleged she was entitled by virtue of certain provisions as to maintenance contained therein, or in the alternative alimony, and also a vesting order vesting the Lambton Mills property in her. By way of defence the plaintiff pleaded *inter alia* the power of attorney and the agreement above quoted, and a mutual verbal agreement between them that they should live separate and apart from one another and that neither should have any claim of any kind against the other.

In this action Mr. J. C. McRuer, K.C., acted for the wife and Mr. E. F. Singer, K.C., for the plaintiff.

The action came on for trial at Toronto before The Honourable the Chief Justice of the High Court in February 1939 and after some evidence was given the parties agreed to a settlement of the action and minutes of settlement were signed. By this settlement the defendant husband agreed to pay to his wife the sum of \$500 per year for life and to deposit securities with a trustee as security for the said payments. He also agreed to pay the plaintiff wife's costs fixed at \$700. There were other provisions in the settlement to which it is unnecessary to refer here. Judgment was given in the action declaring the settlement binding upon the parties and that the same ought to be carried into effect.

The plaintiff has complied with all the terms of the settlement.

The plaintiff now claims that he employed the defendant as his solicitor to obtain from his wife a cancellation of the marriage contract, a release of dower and a complete release of all the marital obligations of the plaintiff; and that the defendant was negligent in the performance of the services rendered to the plaintiff pursuant to such employment, particularly in the preparation of the document which I have quoted.

The plaintiff's wife did not release him from his obligations under the marriage contract. The questions to be decided are, was she willing to so release him and, if so, did the defendant prepare the document quoted intending it to constitute such a release?

The only witnesses called were the plaintiff on his own behalf, and the wife's father, called by the defendant. The foregoing

questions therefore fall to be determined by their evidence and by certain correspondence to which I will refer and by the probabilities.

From my observation of the plaintiff during the trial I definitely concluded that he is temperamental and erratic. In giving his evidence he was voluble and, at times, I thought, evasive. He feels very bitter toward the defendant—not without justification—by reason of facts to which I will later refer when dealing with the plaintiff's claim for damages for maintenance. Examining his evidence as I should direct a jury to do having regard to his demeanour in the witness box, and the general impression created upon me by him and the probabilities as to his veracity in the light of undisputed facts, I should say that his evidence did not create in my mind that degree of positive conviction upon which, in conscience, I would feel justified in founding a judgment in his favour.

He stated that before his wife left Toronto she told him that she was willing to release him and that she suggested that he should have his lawyer prepare the necessary documents for that purpose and go to Grand 'Mere where she would execute them. He stated that he so instructed the defendant. If that were so then I would consider it a strong probability that in those circumstances the defendant, before leaving Toronto to go to Grand 'Mere, would have prepared not only the power of attorney but also an effectual release.

Then there is the further circumstance that in Grand 'Mere, before the wife would sign any document, she insisted upon obtaining the advice of a French advocate. Having obtained his advice she was willing to sign the power of attorney. Why did she not also execute an effectual release? Of course plaintiff's counsel argues that the answer is that the defendant was either so lacking in professional skill as not to know that her signature to a release was necessary or so careless as not to insist on it. I do not think that is the answer. I think the true explanation is to be found in the evidence of the wife's father. He had considerable difficulty during the trial in understanding or in any event in speaking the English language, but I think it is a reasonable conclusion to draw from his evidence that both he and his daughter were unwilling that the plaintiff be given the releases which he sought.

I turn now to the written evidence. In a letter from the defendant to the wife dated February 28th, 1938, put in by the plaintiff at the trial as part of his case the defendant wrote: "In looking over our files I find that the time Arno and I visited you, you signed a document in which you agreed to release all your interest in the marriage contract on condition that he would not do anything to prevent you taking out an annulment of the marriage." That statement, of course, is not correct. She had not signed any such document. She immediately replied in imperfect English by letter dated March 1st, 1938, in part as follows: "For what regard the paper signed when you visited me with my husband, I must say that said paper has been signed under the influence of intimidation from his part and consequently I believe this paper will not have any value in Court. At the very least it can be fought on that ground." I think, having regard to the evidence of the father, that the reasonable meaning to take from that letter is the same as if she had written as follows: "What is the nature of the document which you say I signed releasing him? I have no recollection of having signed such a document and if I did sign it he must have intimidated me because I never intended to release him."

Then why is the document which I have quoted headed "In the Matter of a Marriage Contract" and what was the intended purpose of the document? I confess these questions have given me difficulty. The utter futility of it as a release to the plaintiff would indicate that surely it was never intended as such. Reconciling it with the father's evidence this may be what it was intended to mean, viz., that, in consideration of the wife signing the power of attorney on that date, the husband agreed that, in the event of the wife deciding on some later date to attempt to have the marriage set aside or annulled, the husband would not oppose her attempt and while the marriage subsisted the marriage contract was to remain in effect; but if the marriage should be later annulled then the husband was to be released from the marriage contract. At best I can only speculate as to what its purpose was but such an explanation is certainly consistent with the anxiety that the plaintiff demonstrated from then on that his wife should not delay in proceeding to have the marriage annulled. The

sooner she should succeed in such an attempt the sooner would he be released from the marriage contract.

In my view the plaintiff has not satisfied the onus of proving that his wife was ever willing to release him or that the document referred to was intended to constitute such a release.

The defendant has also pleaded The Limitations Act, R.S.O. 1937, ch. 118, sec. 48, ss. 1(g). This plea is effective and even if the plaintiff had a right of action it is barred by the statute.

Dealing now with the claim founded on maintenance, the following are the facts.

From 1931 until November, 1937, the defendant had not seen nor heard from the plaintiff's wife. During that time he had acted as the husband's solicitor. During that time the wife was apparently not contemplating any legal proceedings against her husband. In 1931 she had written him penitent letters accepting full responsibility for having left him, expressing regret and pleading for a reconciliation.

In November, 1937, the defendant had a dispute with the plaintiff over a solicitor's account. On November 17th the defendant wrote the wife: "If you get this letter let me know as I may be able to help you." She received the letter and in acknowledging it wrote: "I wonder why you are writing me. Please let me know." Then followed considerable correspondence between them. I refer to the highlights only of that correspondence. A letter dated December 8, 1937, from the defendant to the wife: "I am not on good terms with Arno. I expect to have a court case with him soon. As soon as that is over I will see what I can do for you." A letter dated December 10, 1937, from the wife to the defendant: "I still wonder what kind of help you could do for me. I am just thrilled to know." A letter dated January 28, 1938, from the defendant to the wife: "Arno has finally paid me the account he owed me . . . since he is a man of considerable wealth he should pay you alimony as you are willing to live with him," and suggesting an amount of \$15.00 per week. A letter dated January 31, 1938, from the wife to the defendant: "I received your letter which tells me what you can do for me . . . I hope you will get a good result." A letter from the defendant to the wife dated February 9, 1938: "I wrote Arno and told

him that you should have alimony of at least \$15.00 a week, so he has gone to another lawyer to try and arrange a settlement. It appears that when he made a marriage settlement with you before marriage, he agreed to give you a house in Toronto. This house would be worth at least \$3,500.00. . . . If you wish to go on with an annulment of "the marriage we could probably insist upon him giving you the house, or a certain amount of money in lieu thereof. . . . Under the law, I think, if you insist on going back to him he is duty bound to provide a home for you. If he refuses to provide a home he should give you a certain weekly income. . . . Think over the case, and let me know what you want done. I will do anything you want done. I will do anything I can to help you." With this letter the defendant enclosed a written retainer to be signed by the wife. The wife apparently "thought over the case" and replied under date February 11, 1938, returning the retainer signed and enclosing a copy of the marriage contract, and putting her position as follows, viz., that she did not intend to take any action toward an annulment of the marriage and that she demanded the house or \$5,000.00 in lieu thereof and in addition alimony of \$25.00 weekly. Then further intervening correspondence and then a letter dated April 22, 1938, from the defendant to the wife: "I cannot get a settlement with Arno without court proceedings. Shall I start action for divorce with alimony?" Then a letter dated May 9, 1938, from the wife to the defendant: "I am quite opposed to the divorce, but absolutely willing to start an action for alimony. . . . So I hope you will make your choice amongst the best lawyers in Toronto and rush an action in the sense I told you. . . . Now I would enter a claim at same time for the house he gave me on my marriage contract." The defendant did not commence any legal proceedings. The wife wrote him several subsequent letters inquiring as to the delay and not receiving any reply she came to Toronto and consulted Mr. McRuer, K.C., and on June 1, 1938, on her behalf Mr. McRuer commenced the action against the husband. The defendant did not at any time consult with Mr. McRuer, but the seed which the defendant sowed in his letter to the wife took root and flourished and bore fruit which was very bitter for the husband.

In the circumstances above related has the plaintiff any claim for damages for maintenance?

First, what is maintenance? In *Goodman v. The King*, [1939] S.C.R. 446, Kerwin J. has quoted various definitions by text writers and learned Judges, up to and including the statement of Lord Abinger in *Findon v. Parker* (1843), 11 M. & W. 675, at p. 682, which is as follows:

"The law of maintenance as I understand it upon the modern construction, is confined to cases where a man improperly and for the purpose of stirring up litigation and strife, encourages others either to bring actions or to make defences which they have no right to make."

In *Newswander v. Giegerich* (1907), 39 S.C.R. 354, Davies J. at 359, adopted Lord Abinger's statement as still accurately expressing the law of maintenance so that an action for damages will not lie against the maintainer if the plaintiff maintained had a right to bring the action to enforce a claim to which he was entitled.

In *Neville v. London Express Newspaper Limited*, [1919] A.C. 368, there was a divergence of opinion as to whom Lord Abinger referred by the words "which they have no right to make." Lord Atkinson was of the opinion that they applied to the maintainer.

At p. 405 he says: "What then is the nature of the common law action brought for the tort of maintenance? Is it one in which damage is the essence of the action, as in an action, for instance, for personal injuries, through the negligence of the defendant? Or is it one, like actions for trespass, assault or libel . . . in which the mere invasion of the plaintiff's legal right imports damage and is sufficient to maintain the action? In my view it is of the latter class. I think the authorities show that every subject has a legal right not to be harried in courts of justice by actions such as I have mentioned, brought by officious intermeddlers who have no legitimate interest in their subject-matter."

Viscount Haldane, at p. 392, expresses the opinion that "the right to protection against maintenance is an absolute one," and "every infringement of such an absolute right gives a claim to nominal damages, even though all actual loss or injury is disproved."

The majority of the Lords, however, held a different view. Lord Finlay L.C., at pp. 379 and 380, says:

"The action for maintenance is, in my opinion, one which can be sustained only if special damage has been occasioned to the plaintiff by the maintenance. . . . But the action for maintenance at common law is not, in my opinion, an action for the invasion of a right; it is an action in respect of an offence which causes damage to the plaintiff. . . . It cannot be regarded as damage sufficient to maintain an action that the plaintiff has had to discharge his legal obligations or that he has incurred expenses in endeavouring to evade them."

Lord Phillimore, at p. 433, states that maintenance of a suit is justifiable if the suit is righteous and "proof of its righteousness is its success"; and, at p. 434, "So a man who does not pay his just debts or make good his torts cannot complain that he has been compelled (howsoever) to pay or make good."

In the case at bar there is no doubt that the plaintiff's wife had certain claims against him in law and had a perfect right to bring her action to enforce these rights. These rights were admitted by him when, during the course of that trial, on the advice of counsel, he agreed to the settlement already referred to. Therefore he cannot recover from the defendant either the costs incurred by him in that litigation or the amount which, as a result thereof, he agreed to pay his wife by way of settlement.

The action is therefore dismissed with costs.

Action dismissed with costs.

[ROACH J.]

The Tolton Manufacturing Co. Ltd. et al. v. The Advisory Committee under The Industrial Standards Act for Men's and Boy's Clothing Industry.

Constitutional Law—Validity of The Industrial Standards Act, R.S.O. 1937, ch. 191—Property and civil rights—Trade and Commerce—Criminal Law.

The Industrial Standards Act, R.S.O. 1937, ch. 191, is *intra vires* of the Legislature of the Province of Ontario.

The pith and substance of the Act is to regulate particular industries entirely within the Province and the Act constitutes a valid exercise of the powers of the Provincial Legislature under heads 13, 15 and 16 of sec. 92 of the British North America Act, 1867, 30-31 Victoria, ch. 3.

AN action for a declaration that The Industrial Standards Act, R.S.O. 1937, ch. 191, is *ultra vires* of the Legislature of the Province of Ontario and for other relief.

The action was tried by ROACH J., without a jury, at Toronto.

I. F. Hellmuth, K.C., and J. C. M. German, K.C., for the plaintiffs.

J. L. Cohen, K.C., for the defendants.

C. R. Magone, K.C., and J. C. Adams, for the Attorney-General for Ontario.

June 1st, 1940. ROACH J.:—The plaintiffs carry on their respective businesses of manufacturing men's and boys' clothing in the Province of Ontario. In this action they challenge the validity of The Industrial Standards Act, R.S.O. 1937, ch. 191, and seek a declaration that the said Act is *ultra vires* as not within the enacting powers of the Legislature of the Province of Ontario, and that a schedule established pursuant to the said Act for the men's and boys' clothing industry and approved by the Lieutenant-Governor-in-Council on or about the first day of April, 1939, and which establishes maximum hours and minimum wages in the industry, is also *ultra vires*. They also ask for an injunction restraining the defendant from enforcing the said schedule against them and from enforcing payment of sums alleged by the defendant to be owing to it by the plaintiffs pursuant to the said schedule and the regulations made pursuant to the said Act.

The very apparent purpose of the Act is the regulation of the industries within the Province to which it may be made

to apply. To accomplish this purpose it authorizes the establishment of "zones" within the Province and sets up the machinery by which, within those zones, uniformity of wages and working hours for employees engaged in the industry shall be established. It is convenient to refer to certain sections in the Act as indicating its purpose and the manner in which that purpose is to be accomplished.

By sec. 4(1) of the Act the Minister of Labour for the Province "may from time to time designate the whole of Ontario, or any part or parts thereof, as a zone or zones for any business, calling, trade, undertaking and work of any nature whatsoever and any branch thereof and any combination of the same which he may designate or define as an industry for the purpose of this Act."

Section 6: "The Minister may, upon the petition of representatives of employers or employees in any industry within a designated zone or zones authorize an officer to convene a conference of the employers and employees in such industry for the purpose of investigating and considering the conditions of labour and the practices prevailing in such industry and for negotiating with respect to any of the matters enumerated in sec. 7."

Section 7: "The conference may submit to the Minister in writing a schedule of wages and hours and days of labour for the industry affected and such schedule may"—among other things—establish maximum hours and minimum wages and prescribe the specific hours and days of labour for regular work and similarly for overtime work; prohibit overtime work without special permits, and also (ss. (1) "subject to the approval of the Board" (the Industry and Labour Board appointed under the authority of The Department of Labour Act, R.S.O. 1937, ch. 32, s. 2) "and with respect only to an interprovincially competitive industry, assess employers only or employees in any such industry to provide revenue for the enforcement of the schedule, and authorize the advisory committee generally to administer and enforce the schedule and to collect such assessments, and out of the revenue collected to engage inspectors and other personnel and to make such expenditures as are necessary for such administration and enforcement."

Section 8: "If, in the opinion of the Minister, the schedule of wages and hours and days of labour submitted by the con-

ference is agreed to by a proper and sufficient representation of employers and employees, he may approve thereof and upon his recommendation the Lieutenant-Governor-in-Council may declare such schedule to be in force during pleasure, or for the period not exceeding twelve months stipulated in such schedule, within such designated zone or zones as may be prescribed and to be binding upon the employers and employees in the industry referred to in such schedule."

Section 13: "The Lieutenant-Governor-in-Council may make such regulations not inconsistent with this Act as he may deem necessary for carrying out the provisions of this Act and for the efficient administration thereof and such regulations shall be published in the Ontario Gazette and upon being so published shall have the same force and effect as if enacted in this Act and such regulations may be repealed, altered or amended from time to time and such repeal, alteration or amendment shall be published in the Ontario Gazette and upon being so published shall have the same force and effect as if enacted in this Act."

Section 14: "For every zone or group of zones to which any schedule applies the Minister may establish an advisory committee of not more than five members, one of whom shall be designated as chairman, and such committee may hear complaints of employers and employees to whom such schedule applies and may generally assist in carrying out the provisions of this Act and the regulations and shall have jurisdiction and authority to do anything which it is authorized to do by the provisions of such schedule and for the purpose of collecting any money which it is authorized to collect or paying any money which it is authorized to pay shall be deemed a corporation."

Section 12 authorizes the Industry and Labour Board to require any employer affected by the schedule to furnish information respecting employees, their hours of labour, wages, etc., and to produce records with respect to the same.

Other sections of the Act relate to violations of the schedule or regulations and provide penalties for such violations.

Section 5 gives to the Industry and Labour Board jurisdiction and authority, *inter alia*, to administer and enforce the Act, and to determine and designate which industries are interprovincially competitive and provides that any assessments on employers or employees shall not exceed one-half of one per centum of an

employer's pay roll and one-half of one percentum of an employee's wages.

Pursuant to sec. 13 of the Act, regulations were made and approved by Orders-in-Council and were published in the Ontario Gazette. These regulations require the employer to keep certain records with respect to employees, their hours of labour, wages, nature of work, etc. They further require the employer to give any person acting under the authority of the Act access to these records.

Sections 16 and 17 of the Regulations are as follows:

"16. Whenever any schedule requires the employees in any industry to pay an assessment on their wages to the advisory committee appointed to administer such schedule, every employer of any such employee shall collect the amount of such assessment, as the agent of such advisory committee, by deducting or retaining it from the wages of each of such employees on each occasion on which he pays wages to such employees.

"17. Every such employer shall remit the amount so collected to the advisory committee before the 10th day of each calendar month and shall also forward with such remittance a return showing the amount of the assessment and of the wages paid to each employee for work performed in the said industry during the previous calendar month and the method of calculating the said wages and assessments."

Pursuant to the provisions of the Act the Minister of Labour designated and defined all work performed in connection with the entire or partial manufacture or production anywhere in the Province of Ontario of certain types of men's and boys' clothing as the Men's and Boys' Clothing Industry for the purpose of the Act and designated the whole of the Province as a zone for the said Industry. The Industry and Labour Board designated the industry as an interprovincially competitive industry. Adopting the machinery of the Act a conference of employers and employees in the industry was held, a schedule was adopted and submitted to the Minister; it was approved by the Industry and Labour Board and by the Minister and, all the prerequisites of the Act having been complied with, an order-in-council was passed on the 1st day of April, 1939, and approved by the Honourable the Lieutenant-Governor, declaring the said schedule to be in force within the zone and binding

on the employers and employees engaged in the industry. This schedule defines regular working periods, and overtime hours; it fixes minimum wage rates for all classes of employees engaged in the industry and imposes an assessment on each employer of one-half of one per centum of his pay-roll and on each employee of one-half of one per centum of his or her wages.

The defendant is the committee appointed under sec. 14 of the Act.

So much as to the scope and purpose of the Act. Is it *ultra vires*?

The proper procedure in answering that question is first to examine the language employed in the Act which is challenged and determine whether, when fairly considered, the Act falls, *prima facie*, within sec. 91 or within sec. 92 of The British North America Act, 1867. Such an examination may supply the answer to the problem which has to be solved. In *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117, at p. 130, Lord Maugham L.C. said:

"The next step in a case of difficulty will be to examine the effect of the legislation" citing *Union Colliery Co. of B.C. v. Bryden*, [1899] A.C. 580. "For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice and may in a proper case require to be informed by evidence as to what the effect of the legislation will be."

In my view this is not one of those cases where the Court "requires to be informed by evidence as to what the effect of the legislation will be". The whole question can be determined by examining the Act itself. The meaning of the words employed is plain and I cannot find anything within its four corners which requires to be explained by evidence. I am not unmindful of the fact that it is possible that the Provincial Legislature under the appearance of legislating with respect to a subject matter over which it has been given exclusive legislative power may, in that legislation, transgress on the powers of the Dominion Parliament; but if, in the legislation here in question, there has been such transgression, it can be ascertained by examining the Act itself and no further evidence than the mere production of the Act itself would be necessary. Furthermore, if the result of the legislation is pertinent in determining its validity, every possible result could be pointed out in argu-

ment. It was for these reasons that, at the trial, I excluded evidence tendered as to what would be the effect of the legislation.

It is my judgment that the Act is within the competence of the Provincial Legislature under sec. 92 of The British North America Act, heads 13, 15 and 16. The pith and substance of the Act is to regulate particular industries entirely within the Province and it is therefore *intra vires* of the Provincial Legislature.

While the plaintiffs' statement of claim does not specify in what particular the impugned legislation transgresses the powers of the Dominion Parliament, these particulars were set out in correspondence from the plaintiffs' solicitors to the solicitors for the defendants.

The plaintiffs attack the validity of the Act under four headings:

1. That the assessments imposed on employers and employees constitute indirect taxation;
2. That it deals with the Regulation of Trade and Commerce;
3. That the Act, the Orders-in-Council with the schedule attached, and the Regulations result in a combine under The Combines Investigation Act, and
4. That they encroach on the exclusive legislative power of the Dominion Parliament as to Criminal Law (secs. 496 and 498, Cr. Code).

When, during the trial, I excluded evidence as to the effect of the Act, counsel for the plaintiffs declined to argue the case, because in their view such evidence was necessary before they could properly argue it. Accordingly I must now deal with their contentions without the benefit of such assistance as their arguments might have provided.

First, as to the assessments imposed on the employers and employees.

As to the employees, it is a direct tax on them and it matters not that by Regulation 17 the employer is required to deduct it from their wages: see *Forbes v. Attorney-General for Manitoba*, [1937] A.C. 260.

As to the employers, it is argued that they will simply add this tax to other items of overhead and pass the burden on to be borne by others. The Act sets up the machinery for regulat-

ing the industry and it is sufficient to say that the assessments both on the employer and employees, apart from every other consideration, can be justified on the ground that they are charged to defray the cost of operating that machinery. They are charges for services rendered. See *Shannon et al. v. Lower Mainland Dairy Products Board*, [1938] A.C. 708.

Dealing now with the objection that the Act, etc., deals with the regulation of trade and commerce, it is obvious that the Act is not legislation "in respect of" trade and commerce. As already stated the pith and substance of the Act is the regulation of particular industries within the Province. In *Shannon et al. v. Lower Mainland Dairy Products Board* (*supra*) Lord Atkin, at p. 719, said:

"It is now well settled that the enumeration in sec. 91 of 'the regulation of Trade and Commerce' as a class of subject over which the Dominion has exclusive legislative powers does not give the power to regulate for legitimate Provincial purposes particular trades or businesses so far as the trade or business is confined to the Province;" citing *Citizens Insurance Co. of Canada v. Parsons*, 7 App. Cas. 96; *Reference re The Natural Products Marketing Act, 1934, and Its Amending Act, 1935*, [1937] A.C. 377, "And it follows that to the extent that the Dominion is forbidden to regulate within the Province, the Province itself has the right under its legislative powers over property and civil rights within the Province."

The judgment of the Privy Council in *Attorney-General of Canada v. Attorney-General of Alberta* (*in re The Combines and Fair Prices Act 1909 (Canada)*, Ch. 45, and *The Board of Commerce Act 1919 (Canada)*, Ch. 37), [1922] 1 A.C. 191, is decisive that the Dominion Parliament has no power to enact legislation of the character here in question.

Reference also to *Home Oil Distributors Ltd. et al. v. Attorney-General of British Columbia, et al.*, [1939] 3 D.L.R. 397, affirmed by the Supreme Court of Canada, [1940] 2 D.L.R. 609.

It is convenient to consider the remaining two objections together.

It is now settled that the greater part of the provisions of The Combines Investigation Act fall within the legislative power of the Dominion Parliament under sec. 91, heading 27, viz., The Criminal Law. It has been so held in *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310.

Not having had the benefit of a fully developed argument by counsel for the plaintiffs at the close of the evidence, I can only surmise, as a result of discussion with them during the trial on the question of admissibility of evidence, that their argument would come under both or either of the following headings:

First, that the regulations imposed on the industry in which the plaintiffs are engaged presently result in a combine as defined in The Combines Investigation Act, R.S.C. 1927, ch. 26, or bring those members of the industry and their employees who were originally responsible for the compilation of the schedules and regulations, as well as those who later agreed, or might agree to or acquiesce in them, within secs. 496 and 498 of the Criminal Code, and that they are, or may become, guilty of the criminal offence of conspiracy in restraint of trade.

Second, that the present schedule of wages and hours, and the present assessment against the employer may drive the plaintiffs and other manufacturers in the industry out of business and thereby "unduly" lessen competition in the industry to the detriment of the public. And that for either of the foregoing reasons the Legislature, while purporting to legislate respecting property and civil rights, actually has encroached on a subject allotted exclusively to the Dominion Parliament by sec. 91(27) of the British North America Act, viz., The Criminal Law including Procedure in Criminal Matters.

Dealing with the first of these possible arguments, it is obvious that there can be uniformity in an industry without a combine as defined in The Combines Investigation Act. It is equally obvious that the legislation is aimed at establishing uniformity in the industry within the Province, and the reasonable protection of workmen or employees engaged in the industry. Section 498(2) of The Criminal Code provides that, "Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees." Therefore, the employees engaged in this industry, independently of the Act, could have combined to enforce a schedule similar to the one authorized by the Act. Furthermore, this argument is tantamount to charging the Crown with being an accessory to a crime.

Dealing next with the second possible argument, in my view of the Act, fairly considered in its "true nature and character," its "pith and substance" deals with a matter within the legislative

competence of the Provincial Legislature. It is to be presumed that the power of regulation will be exercised in good faith and not be abused. In *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575, the Privy Council held a provincial statute valid which imposed certain direct taxes on banks, insurance companies and every incorporated company carrying on business in the Province. One argument advanced against its validity was that a legislature might impose taxes so heavy as to crush a bank and nullify the power of Parliament to establish such institutions. In dealing with that argument their Lordships said that if it is found "that, on due consideration of the Act a legislative power falls within sec. 92, it would be quite wrong to deny its existence because by some possibility it may be abused or may limit the range which otherwise would be open to the Dominion Parliament." The purpose of the Act here impugned is "to regulate," not "to abolish."

It is my judgment that on all grounds on which the plaintiffs rest their case they fail.

The action is therefore dismissed with costs.

Action dismissed with costs.

[HOGG J.]

Re Carnochan.

Mental incompetency—The Mental Hospitals Act, R.S.O. 1937, ch. 392—Certificated patients—Whether examination of a person under sec. 20 of the Act can be conducted by physicians without the patient's consent—Habeas corpus.

By sec. 18 of The Mental Hospitals Act, R.S.O. 1937, ch. 392, it is provided that any person who is mentally ill or mentally defective may be admitted to an institution as a certificated patient. By sec. 20 of the Act it is provided that certificated patients shall be admitted to an institution only upon prescribed certificates of two medical practitioners.

Held, on an application by way of habeas corpus, that the examinations by the physicians contemplated by sec. 20 of the Act may be conducted without the consent of the patient: *Re Gibson* (1907), 15 O.L.R. 245, distinguished.

A motion by Robert Kenneth Carnochan by way of habeas corpus with certiorari in aid for an order discharging the applicant from the Ontario Hospital at Brockville.

The motion was heard by HOGG J. in Weekly Court at Ottawa. *S. Berger*, for R. K. Carnochan, the applicant.

C. P. Hope, K.C., for the Deputy Minister of Health, and for the Superintendent of the Ontario Hospital at Brockville.

June 19th, 1940. HOGG J.:—Pursuant to a writ of *habeas corpus* issued on the 28th May, 1940, this present motion is made on behalf of Robert Kenneth Carnochan for an order discharging him from the Ontario Hospital at Brockville where he is now detained as being a person who is mentally ill. Orders by way of certiorari were obtained on behalf of the applicant directing the return by the Deputy Minister of Health and Hospitals of Ontario and by J. F. McKinley, Judge of the Family Relations Court at Ottawa, respectively, of all papers, records and proceedings in connection with the committal of Carnochan to the Ontario Hospital at Brockville, and all such papers, records and proceedings are now before the Court.

A brief history of this matter is as follows. On the 22nd November, 1939, upon an information laid by Margaret J. Carnochan, wife of the applicant, alleging that he had not carried out the terms of an order of the 25th August, 1939, made under The Deserted Wives' and Children's Maintenance Act, whereby Carnochan was to pay his wife \$80 per month for her support, the said Carnochan appeared on the 24th November before J. F. McKinley, the Judge presiding in the Family Relations

Court at Ottawa. The case was adjourned to the 1st December. On this later date, Carnochan did not appear, and on the 3rd December, Carnochan was apprehended under the authority of a bench warrant and brought before the said Judge on the 4th December. The record of the proceedings in the Family Relations Court is brief. It seems to be apparent that the Crown Attorney at Ottawa had communicated with the Ontario Health Department, and as a result Dr. McKerracher of the Mental Health Clinic attended upon the adjourned hearing on the 4th December. The record of proceedings shows that it was intimated to Carnochan that Dr. McKerracher was present to examine him and that Carnochan was willing that such examination be proceeded with. The case was adjourned to the 7th December, and on that date the charge against Carnochan was withdrawn. There is no further evidence before me that Dr. McKerracher conducted an examination into the mental condition of Carnochan except an affidavit made by Mr. Berger, the solicitor and counsel for the applicant, which sets out that such examination was made on the 4th December last. The Judge of the Family Relations Court did not act, nor did he take any action purporting to act, under the provisions of sec. 35 of The Mental Hospitals Act, R.S.O. 1937, ch. 392, and amendments thereto. This section provides that any person may be admitted to an institution upon an order of a Judge or magistrate where such person has been charged with an offence.

On the 5th December, 1939, Carnochan was examined as to his mental state by Dr. J. Fenton Argue and Dr. Max O. Klotz, both medical practitioners of Ottawa. It does not appear in evidence upon whose instructions such examinations were proceeded with.

It is admitted by counsel for Carnochan that all the terms and provisions of sec. 20 of the said statute were complied with and the return before me shows this to be a fact.

The above named physicians having found that Carnochan was mentally ill, and having issued certificates upon the required forms to that effect, he was admitted to the Ontario Hospital at Brockville on the 6th December as a certificated patient as provided by secs. 20, 21 and 22 of The Mental Hospitals Act.

It is contended by counsel on behalf of the applicant that the applicant's detention in the Ontario Hospital at Brockville is illegal because it was a result of the proceedings and the

direction of the Judge of the Family Relations Court at Ottawa before the final disposition of the case, that Carnochan was placed in the institution in question and that the Judge should have invoked the provisions of sec. 35 of the statute. It was also argued that the examination made by the two above named physicians into the mental condition of Carnochan could not properly and legally be made without Carnochan's consent thereto.

I do not think it necessary, in disposing of the issue before me, to deal with the question as to whether the Judge of The Family Relations Court at Ottawa had power to act and should have acted under sec. 35 of the statute. The fact remains that he did not do so; nor do I think that sec. 35 makes it imperative that a Judge or magistrate must act under the conditions here present. Neither do I think it material to the issue whether Carnochan was or was not examined by Dr. McKerracher. If he were so examined, it is apparent that such examination was made with his consent. The fact is that Carnochan was examined as to his mental condition by two duly qualified medical men, and the provisions of secs. 20 and 21 with regard to certificated patients, were fully carried out and complied with.

Mr. Berger relies upon the decision in *Re Gibson* (1907), 15 O.L.R. 245, as the basis for his contention that the examinations of a patient provided for by sec. 20 of the Statute can only be proceeded with upon the consent of the patient, in other words, that the consent of the patient is a condition precedent to the exercise of any of the powers given by sec. 20.

The Lunatic Asylums and the Custody of Insane Persons Act, found in the Revised Statutes 1897, in force when *Re Gibson* was before the Court of Appeal, contains many provisions not found in the present statute. A distinction is made between those persons who are termed lunatics and those termed dangerous lunatics, and the proceedings necessary for the admission of one or other of such class of persons are not at all similar.

The discussion by Meredith J.A. in the *Gibson* case, as to whether the consent of a person should be had, is directed to such person's detention in an asylum not to the examination by physicians necessary before a person can be held to be a certificated patient, and the language used by the learned Justice of Appeal is a result of certain anomalies and inconsistencies appearing in the statute as between its provisions for the admis-

sion and retention of lunatics and dangerous lunatics. This consideration was, as is stated in the judgment, not necessary for the determination of the issue then before the Court.

The present statute, by sec. 19, provides for the admission of voluntary patients to an institution, that is, those who have consented to be admitted. I can find no provision in the statute which expressly states, or from which it can be inferred, that a patient, certificated according to the terms of sec. 20, must either consent to the examination into his mental state or to his admission to an institution; on the contrary, according to sec. 24, a person who has been admitted as a voluntary patient may be continued in the institution as a certificated patient. Section 22 gives authority for the detention of a certificated patient in an institution as long as such patient remains mentally ill or mentally defective.

By reason of the fact that the requirements of the statute have been complied with, I have no power to do other than dismiss the application for the discharge of the applicant from the Ontario Hospital at Brockville. There will be no costs.

Motion dismissed without costs.

[HOGG J.]

Re Coppley.

Wills—Interpretation—Gifts by implication—Trust of moneys to pay the income from the fund to A. for life and if A. should die without issue as A. may appoint or in default of appointment to next of kin of A. and if A. should die without a will and leaving issue then to the issue of A.—Death of A. with a will and leaving issue—Bequest of fund by will of A. to A.'s daughter—Whether gift to daughter of A. in events that happened can be inferred from will of testator.

The testator by his will created a trust of certain moneys and directed his trustees to pay the income from the fund to A. for life and that if A. should die without issue living at A.'s death to pay the corpus of the fund to such persons as A. might by her last will appoint and in default of appointment to the next of kin of A. He further directed that if A. should die without a will and leaving issue living at her death the corpus of the fund was to be paid to such issue.

After the death of the testator A. died having made a will by which she bequeathed her entire estate to her daughter who was alive at the date of A.'s death.

On an application as to the interpretation of the will of the testator the question for determination was whether in the circumstance which happened a gift to the daughter of A. could be inferred from the will of the testator, the circumstance of A. dying with issue and after making a will not having been expressly provided for in the will.

Held, that from a perusal of the whole will and having regard to the scheme underlying the whole will which was to provide, after the death of those who took a life interest, for the issue or children of the life tenants, the testator's intention was that the issue of A. were to receive after A.'s death the benefits which A. obtained during her life and therefore a gift of the corpus of the fund by implication to the daughter of A. should be inferred. The principles discussed in *Kinsella v. Caffrey* (1860), 11 Ir. Ch. 154, applied.

A motion by the trustee of the estate of the late George Charles Coppley, deceased, for an order answering certain questions as to the proper interpretation of the will of the deceased.

The motion was heard by HOGG J. in Weekly Court at Toronto.

H. M. Vila, for The National Trust Co. Ltd., trustee.

J. R. Cartwright, K.C., for the executor of the will of Mary Elizabeth Appleton.

H. A. F. Boyde, K.C., for the residuary beneficiaries.

P. D. Wilson, K.C., Official Guardian, for Margaret Appleton, an infant.

June 25th, 1940. HOGG J.:—This is a motion by the executor and trustee of the will of the late George Charles Coppley, deceased, for the determination of certain questions arising in the administration of his estate, and as to the meaning and effect of certain portions of his will.

The testator died on the 15th October, 1936, probate of his will being granted to The National Trust Co. Limited on the 17th December, 1936.

By clause 6 of the will, the testator directed his trustee to set aside the sum of \$120,000 to be divided into twenty-four equal units, designated as "trust fund units," and to pay the income derived from this fund to the certain persons mentioned in the will.

The difficulty which has arisen with respect to the meaning of the will and the construction to be placed upon the language used by the testator is confined to paragraphs 6(e) and 6(f) of the will, and particularly to paragraph 6(f). This paragraph reads:

"(f) Upon trust to pay the net annual income of a further two of the said trust fund units to my said niece, Mary Appleton, in monthly instalments during her natural life and after her death, should she die without issue living at her death, then the corpus of the said two trust fund units in this clause mentioned together with the corpus of the two trust fund units mentioned in the preceding clause (e) hereof which shall remain at the death of my sister, Nellie Beekman, shall be paid to such person or persons and in such manner as my said niece, Mary Appleton, shall by her last will and testament appoint, and in default of appointment or insofar as such appointment shall not extend unto her next-of-kin, who, under the Statutes of Distribution in force in Ontario, would be entitled thereto in case of her intestacy but should she die without a will and leaving issue living at her death, then upon trust for her issue who being sons attain the age of twenty-one years or being daughters attain that age or marry under that age and if more than one in equal shares per stirpes and I further empower my trustee to pay to my said niece, Mary Appleton, or for her benefit out of the two trust fund units mentioned in this clause a sum not exceeding one thousand dollars in case of emergency such as illness requiring hospital or prolonged medical treatment."

Paragraph 6(e) directs the trustee to hold two of the said trust fund units for Nellie Beekman, a sister of the testator, who is to receive out of the corpus and income of these two units the sum of \$50 a month, and after her death the trustee is to pay the income from so much of these two units as shall remain to the said Mary Appleton. After the death of Mary Appleton

the balance of these two units is to be added to the units set aside for Mary Appleton, held upon the trusts set forth in said clause (f).

The said Nellie Beekman is still living, but Mary Elizabeth Appleton died on the 27th November, 1939, leaving as her sole surviving child her daughter, Margaret Helen Appleton, who was born on the 23rd May, 1921.

The questions which the Court has been asked to determine are:

(1) Did Mary Elizabeth Appleton, having died leaving a last will and testament, and leaving issue living at her death have any power of appointment by her will over the corpus of the two trust fund units mentioned in paragraph (f) of clause 6 of the will of George Charles Copley, together with the corpus which may remain at the death of Nellie Beekman, of the two trust fund units mentioned in paragraph (e) of clause 6 of the said will?

(2) If so, was such power of appointment validly exercised by the will of the said Mary Elizabeth Appleton?

(3) Is the executor of the will of Mary Elizabeth Appleton entitled to receive payment of the said trust fund units mentioned in question (1)?

The will of Mary Appleton bequeathed her whole estate to her daughter, Margaret Helen Appleton. It is to be noted from a perusal of the clause of the will now under discussion that Mary Appleton not only died with issue, but died after making a will, and these circumstances are not provided for in the said paragraph.

It is argued on behalf of the executor of Mary Appleton's estate, and on behalf of her daughter, Margaret, still an infant, that it should be held that there is a gift by implication to Margaret Appleton, and that the fact that Mary Appleton made a will and attempted to provide for her issue should not prevent such issue taking. It is argued that the extraordinary result should not follow that Margaret Appleton would be entitled to the trust fund units in question if her mother had not made a will, but would not be entitled to them for the reason that Mary Appleton made a will which bequeaths these units to this child. If the will of Mary Appleton is not effective, and it is held that her daughter Margaret could inherit the trust fund units in question under clause 6(f) of the testator's will only if her

mother had died without a will, then these units would fall into the residue of the estate which is dealt with by clause 8 of the will. This clause directs that if the residue of the estate should prove sufficient in amount the fund of \$120,000 already referred to is to be increased to \$168,000, and the balance of the residue is then to be divided equally per capita among the children of the nephews and nieces of the testator living at the expiration of two years after his death.

Upon a perusal of the whole will it seems to be apparent that the general scheme propounded by the testator is that the shares of those who receive an interest for life shall on the death of such life tenants go to their issue. By paragraph 3(v) the testator bequeaths a pecuniary legacy to certain nieces who are named, and in the event of any one of these legatees predeceasing the testator leaving a child or children, such legacy shall not lapse but shall be divided equally among such children. And, as has been stated, the residue after providing for an increase in the amount of each of the trust fund units, is divided equally among the children of nephews and nieces.

Clause 6(a) of the will also provides for certain nieces for life and to their issue upon their decease, as do also clauses 6(b) and 6(c).

Well over a century ago in the case of *Ex parte Rogers* (1816), 2 Madd. 449, the Vice-Chancellor, Sir Thomas Plumer, expressed himself in the following language in referring to the endeavour to ascertain the intention of the testator to be gathered from the will then before the Court, and the right of the Court to give effect to an implied intent:

“Unless the intention be manifest the Court cannot act, and though the intention of the testator may appear to a Judge to be different from what he has said, yet the Court, as in *Denn v. Bagshaw*, must decide according to the words he has used. It must not make a will for the testator, but only construe it. But there are many cases where the bequest has been ambiguously worded, the Court has given effect to a clear implied intent.”

In *Towns v. Wentworth* (1858), 11 Moore P.C. Cases 526, the Right Honourable T. Pemberton Leigh, afterwards Lord Kingsdown, said:

“When the main purpose and intention of the testator are ascertained to the satisfaction of the Court, if particular expres-

sions are found in the will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions must be disregarded or modified; and, on the other hand, if the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator, so as to carry into effect as far as possible, the intention which it is of opinion the testator has on the whole will sufficiently declared."

The principle or rule of law which governs with respect to the problem now before the Court for solution was laid down and established in the leading case of *Kinsella v. Caffrey* (1860), 11 Ir. Ch. 154. The Master of the Rolls enunciated the law under three headings, and it is the second and third of these which it is necessary to consider and to endeavour to ascertain whether there are circumstances presented by the will now under consideration which bring the matter within the principle.

The second rule was stated by the Master of the Rolls to be:

"If there is a bequest to the parent for life, and if he died without having or leaving children, to B., if the parent dies leaving children, they are not entitled by implication." The third rule is as follows:

"If, however, in a case such as I have last mentioned, there are matters on the face of the will to raise an inference in favour of the children, the Court is at liberty to consider these circumstances in connection with the bequest over, in the event of the parent dying without having or leaving children, although such bequest over by itself is not sufficient to justify the Court inferring a gift in favour of the children."

In the old case of *Re Rogers*, to which I have referred above, by the codicil to the testator's will the interest on a sum of money was secured to a niece for life, and at her decease without child or children, this sum was to be divided between the sisters of the said niece. It was held that under the circumstances disclosed by the will, the children of the niece were entitled by implication to the legacy.

The learned author of *Theobald on Wills*, 9th ed., p. 620, is of the opinion that the judgment in this case probably went too far, but the Master of the Rolls, in *Kinsella v. Caffrey*,

discusses certain criticism of the judgment in *Re Rogers* in several cases subsequent to that judgment, and he apparently was not in accord with such criticism.

In the judgment in *Re Rawlins Trusts* (1890), 45 Ch. D. 299, affirmed in the House of Lords under the name *Scale v. Rawlins*, [1892] A.C. 342, the judgment in *Kinsella v. Caffrey* was approved. Bowen L.J. at p. 307, stated, referring to the rule laid down in the *Kinsella* case, that the Court "have only to consider whether on this will there are other matters disclosed on the face of it which ought to lead us to infer a gift to the children from words which in themselves and without such matters of contextual importance would not be sufficient to justify us in assuming that such a gift to the children was intended." The learned Lord Justice held that there were not sufficient indications afforded by the rest of the will to enable the Court to say that there was an implied gift in favour of the children "without departing from the field of reasoning and entering on the field of conjecture and speculation."

In *Stobbart v. Gardhouse*, 7 O.R. 239, Boyd C. in discussing the meaning of the will then before him for interpretation, where the question was whether the widow of the testator under the residuary clause should receive certain property as undisposed of, or whether a child of a devisee for life should receive the property, said that the Court will in such cases lay hold of slight circumstances to give property by implication to the child, and he referred to the case of *Kinsella v. Caffrey*.

Also in *Re McClellan* (1925), 58 O.L.R. 24, in the Court of Appeal, the question of a gift by inference or implication was discussed.

I have reached the conclusion that it is sufficiently manifest from a perusal of the whole of the will that the testator's intention may be held to be, that the issue of his niece, Mary Appleton, namely, Margaret Appleton, was to receive, after Mary Appleton's death, those benefits which her mother obtained for her life under the will now before the Court. As I have mentioned, the scheme underlying the whole will, is, in my opinion, to provide, after the death of those who take a life interest, for the issue or children of these life tenants, and I do not think that the intention can be gathered from the will that the testator meant that the child of his niece, Mary Appleton, was not to

receive her mother's share if her mother made a will in her favour, although this child would receive her mother's portion under the will if her mother had not made a will. My opinion is that there is a gift by implication to Margaret Appleton of the benefits received by her mother, the late Mary Appleton, under clauses 6(e) and (f) of the will of the late George Charles Copley.

In view of the above conclusion it is not necessary to answer the questions set out in the notice of motion on this application. Costs of all parties should be costs out of the estate.

Order accordingly.

[McTAGUE J.A.]

Williams et al. v. The King.

Taxation—Succession Duty—Situs of shares of a mining company incorporated under the laws of the Province of Ontario—Shares owned by deceased who was domiciled in State of New York—Share certificates physically situate in State of New York—Head office of company in Ontario—Transfer agencies established by company both in Ontario and in State of New York—Whether shares subject to succession duty—The Succession Duty Act 1934, 24 Geo. V, ch. 55, sec. 6(1).

The deceased, who died in the State of New York and who was domiciled in that State, was at the date of his death the owner of a number of shares of the capital stock of Lake Shore Mines Ltd., a company incorporated under the Ontario Companies Act operating in Ontario and having its head office in Ontario. At the date of his death the share certificates were physically situate in the State of New York. By a by-law of Lake Shore Mines Ltd. the matter of stock transfers was dealt with in part as follows: "A stock transfer book shall be provided in such form as the directors may approve . . .". By resolutions of the board of directors of the company registrars and transfer agents at the City of Toronto in the Province of Ontario and at the City of Buffalo in the State of New York were appointed and a complete register of shareholders and complete transfer facilities were kept both at Toronto and Buffalo.

In the present proceedings the Treasurer of the Province of Ontario contended that the shares of stock of Lake Shore Mines Ltd. owned by the deceased were "property situate in Ontario" within the meaning of sec. 6(1) of The Succession Duty Act, 1934, 24 Geo. V, ch. 55, and that therefore the shares were subject to succession duty in Ontario.

Held, that the shares were not subject to succession duty in Ontario since they were not "property situate in Ontario". The situs of the shares in question was at Buffalo, in the State of New York, since the shares could be effectively dealt with there without anything further to be done in Ontario. It must be presumed that the transfer agency and register of shareholders in Buffalo were legally there under the laws of the State of New York and whatever right or power the foreign jurisdiction bestowed upon Lake Shore Mines Ltd. to maintain the agency and register the company had the capacity

to accept, and there is nothing in the Ontario Companies Act or the letters patent of the company declaring otherwise: *Erie Beach Company Ltd. v. Attorney-General for Ontario*, [1930] A.C. 161, distinguished.

A petition of right by Eva May Williams and Reginald Victor Williams, executors of the will of Alexander Duncan Williams, deceased, for the recovery of certain moneys from His Majesty the King, as represented by the Attorney-General for Ontario.

The petition of right was heard by McTAGUE J.A., without a jury, at Toronto.

Peter White, K.C., *Everett Bristol*, K.C., and *E. W. Tyrrill*, for the suppliants.

D. L. McCarthy, K.C., and *L. R. McTavish*, for the Attorney-General for Ontario, respondent.

May 15th, 1940. McTAGUE J.A.:—Alexander Duncan Williams, a citizen of the United States of America domiciled in the City of Buffalo, New York, died on the 22nd day of July, 1934, Letters Probate were granted to the suppliants as executors of his will by the Surrogate Court of Erie County, in the State of New York, on the 2nd day of August, 1934. At the time of his death the deceased owned in Ontario certain real estate, credit balances in banks and securities. In addition he was the owner of 10,200 shares of the capital stock of Lake Shore Mines Limited, a company incorporated under the Ontario Companies Act operating in Ontario and having its head office in this Province. On application for ancillary Letters Probate in Ontario suppliants filed a statement showing the assets of the deceased in Ontario, but maintained that the shares of Lake Shore Mines Limited were property situated outside the Province and not liable to succession duty. No question arises as to the liability for duty on the other assets. It has been paid. The Provincial Treasurer contended on the other hand that the shares of Lake Shore Mines Limited were property situate in Ontario and liable to duty. As a condition to releasing the other Ontario assets the Treasurer required the suppliants to pay the sum of \$78,000 estimated duty. This was paid on the 22nd day of July, 1935. It is admitted by the respondent that the payment was made under duress and compulsion and subject to protest. It is also admitted that the amount now in dispute as of July 22nd, 1935, is \$65,336.17, the difference between that sum and \$78,000 required to be paid being duty for which the suppliants

admit liability plus a small refund of \$1,347.68 made by the Treasurer. By their petition of right suppliants ask for a declaration that the 10,200 shares of Lake Shore Mines Limited owned by the testator are not subject to succession duty in Ontario and that they are entitled to refund of the sum of \$65,336.17, with interest from the date of payment, July 22nd, 1935.

The liability of the suppliants for the duty sought to be imposed depends on sec. 6, subsec. 1 of The Succession Duty Act, 1934, 24 Geo. V, ch. 55:

"(1) All property situate in Ontario and any income therefrom passing on the death of any person, whether the deceased was at the time of his death domiciled in Ontario or elsewhere, and every transmission within Ontario owing to the death of a person domiciled therein of personal property locally situate outside Ontario at the time of such death, shall be subject to duty at the rates hereinafter imposed." In this case there is no question of a transmission within Ontario, and it is admitted that the deceased was domiciled in the State of New York. The question then is the very simple one—are the shares in question property situated in Ontario?

Lake Shore Mines Limited was incorporated under the Ontario Companies Act by Letters Patent dated the 25th day of February, 1914. The Letters Patent contain the usual recital, "Whereas the Ontario Companies Act provides that with the exceptions therein mentioned the Lieutenant-Governor may by letters patent create and constitute bodies corporate and politic for any of the purposes to which the authority of the Legislature of Ontario extends."

By its by-law No. 2, paragraph 17, passed the 30th day of May, 1914, the company dealt with the matter of stock transfers in the following terms:

"17. A stock transfer book shall be provided in such form as the Board of Directors may approve of and all transfers of stock in the capital of the company shall be made in such book and shall be signed by the transferor, or by his attorney duly appointed in writing. Stock certificates shall be in such form as the Board may approve of and shall be under the seal of the company and shall be signed by the president or vice-president and the secretary or such other officer in place of the secretary as the board may by resolution authorize."

On the 21st day of December, 1916, the board of directors passed a resolution appointing the Trusts and Guarantee Company Limited transfer agent and registrar of its capital stock at Toronto, and an agreement was entered into pursuant to the resolution. By resolution of the board of directors passed on the 21st day of May, 1925, the Royal Trust Company was appointed registrar of the company's stock at Toronto. The Trusts and Guarantee Company Limited continued to act as transfer agent. On the 18th day of May, 1927, the board of directors by resolution appointed the Manufacturers and Traders Trust Company of Buffalo, New York, an additional registrar and transfer agent at whose office, "shareholders may have their stock registered and transferred within the United States of America."

At the time of the testator's death there were two transfer agents, the Trusts and Guarantee Company Limited at Toronto, and the Manufacturers and Traders Trust Company at Buffalo, New York. There were also two registrars, The Royal Trust Company at Toronto and the Manufacturers and Traders Trust Company at Buffalo. A shareholder desiring to transfer his shares could present them either in person or by his attorney at the office of the Trusts and Guarantee Company Limited at Toronto, or at the office of the Manufacturers and Traders Trust Company at Buffalo. Both these companies kept on hand share certificates in blank already executed by the proper officers of the company, and on being satisfied with the validity of the transfer would countersign the new certificate and have it countersigned by the respective registrars, if in Toronto by the Royal Trust Company and if in Buffalo by the Manufacturers and Traders Trust Company and deliver it to the transferee. At the end of each business day the transfer agents supplied each other with a record of the day's transactions, so that on this information being passed along to the registrars a complete register of shareholders was kept both at Toronto and Buffalo. An examination of the stock certificate itself describes the shares as being transferable only on the books of the company. In view of some of the provisions of the Ontario Companies Act, which I shall deal with later, it becomes important perhaps to decide whether the transfer books kept by the Trusts and Guarantee Company Limited at Toronto, and by the Manufacturers and Traders Trust Company at Buffalo, are legally the books of the

company. I am unable to see any objection to the proposition. It is part of the transfer agents' and registrars' job to keep these books. They are paid for keeping them by the company, and they are surely the company's books in just the same way as a book of account kept by a salaried accountant is a book of the company.

The certificates for the shares in question here were the property of a person domiciled in the State of New York, and the evidence clearly establishes that at the time of Mr. Williams' death the certificates were physically located in Buffalo, New York.

The legal doctrine involved seems to me to be fairly clearly developed. The leading case on the subject is undoubtedly *Attorney-General v. Higgins* (1857), 2 H. & N. 338. The question was as to the situs of certain shares for Stamp Duty purposes in Scotland. The shares in question belonged to a deceased domiciled in York, England, and the certificates were located there. It was held that the situs of the shares was in Scotland. Martin B. put the matter very pithily: "It is clear . . . that the evidence of title to these shares is the register of shareholders and that being in Scotland the property is located in Scotland." It is to be observed that the situs was determined by the locus of the register of shareholders and not by the locus of the company's head office, although in that case the places happened to be the same.

In re Clark, McKecknie v. Clark, [1904] 1 Ch. 294, had to do with the construction of a will. The testator was domiciled in England. He bequeathed shares in certain South African mining companies. The question was whether the shares for the purposes of the will were to be regarded as English property or as South African property. The head offices of the companies were in South Africa where registers of shareholders were kept. The companies also had offices in London, where a duplicate register was kept, and where the shares could be transferred. It was held that the shares passed as English property.

In Attorney-General of Nova Scotia v. De Hamar (1921), 61 D.L.R. 251, the situs of shares in a Nova Scotia company was in question. By a statute of Nova Scotia the company was required to keep a register of shareholders in the Province and any register kept outside the Province was to be deemed part of the general register. The company had a registry office in

New York where the shares in question were registered. The Nova Scotia Court of Appeal held that since the deceased was domiciled in New York, the share certificates were physically there and could be effectively transferred there without further act in Nova Scotia, there was no liability to succession duty in Nova Scotia. In other words the situs of the shares was in New York.

In *Brassard v. Smith*, [1925] A.C. 371, certain Royal Bank of Canada shares belonged to a deceased person resident and domiciled in Nova Scotia. The bank had power by a Dominion Statute to maintain in any Province a registry office at which alone shares held by residents of that Province could be registered and validly transferred. The Judicial Committee held that the ownership of the shares could only be effectively dealt with in Nova Scotia, and therefore were not property in Quebec for succession duty purposes, although the head office of the bank was at Montreal, in the Province of Quebec. The case is most important as providing the working rule in this type of case. To quote from Lord Dunedin, at page 376:

"Their Lordships consider that the question was really settled by *Attorney-General v. Higgins*. Baron Martin in that case says in so many words: 'It is clear that the evidence of title to these shares is the register of shareholders and, that being in Scotland, this property is located in Scotland.'

"It is quite true that in that case the head office as well as the register was in Scotland, but in their Lordships' view it is impossible to hold that in that case the position of the head office was the dominant factor merely on the strength of a phrase used by the reporter of the Attorney-General's argument, and a casual reference made to the case by Lord Esher in a subsequent case of *Attorney-General v. Lord Sudeley*. In the present case Duff J., dealing no doubt with the 'no local situation' argument, said as follows: 'And the Chief Baron's judgment, I think, points to the essential element in determining situs in the case of intangible chattels for the purpose of probate jurisdiction as "the circumstances that the subjects in question could be effectively dealt with within the jurisdiction."' This is, in their Lordships' opinion, the true test. Where could the shares be effectively dealt with?"

In *Baelz v. Public Trustee*, [1926] 1 Ch. D. 863, a German national was beneficially entitled to certain shares in a trading

corporation registered in England under the Companies Acts. All of its business was carried on in Holland and was conducted by directors domiciled and resident in Holland. The register of its members was kept at an office in England. It was held that for the purpose of determining whether there was a charge against the shares imposed by Treaty of Peace orders, the situs of the shares was to be regarded as in England.

Another case in our own Courts decided along similar lines is *Re McFarlane*, [1933] O.R. 44. See also *In re Aschrott, Clifton v. Strauss*, [1927] 1 Ch. 313.

In the case at bar, however, the Attorney-General, while not disputing the principle laid down in the cases above reviewed, contends that it is not applicable here because Lake Shore Mines Limited has neither power nor authority to set up a transfer office in another jurisdiction. If it has the capacity it seems to me the legal result follows not from any intentional act of the company but in the natural course. The contention is that in the cases which I have reviewed the various companies involved had specific authority by statute to establish transfer agencies in foreign jurisdictions and an Ontario company has not. An analysis of the Ontario Companies Act reveals no specific authorization to establish such transfer agencies. Neither, in my opinion, does one find any prohibition either express or implied. The question is, what follows?

It seems to me that *Bonanza Creek Gold Mining Company Limited v. The King*, [1916] A.C. 566, once and for all decided what is the nature of a company incorporated under the Ontario Companies Act and what is the proper method of approach in determining its powers and capacities. Distinguishing between the type of company incorporated under the British Companies Act and companies created by special Act on the one hand, and companies which derive their existence from the Act of the Sovereign (and it was held that a company incorporated under the Ontario Companies Act belongs to this class) Lord Haldane referred to the grant of a charter in these words, at page 582:

"But, if validly granted, it appears to their Lordships that the charter conferred on the company a status resembling that of a corporation at common law, subject to the restrictions which are imposed on its proceedings. There is nothing in the language used which, for instance, would preclude such a company from

having an office or branch in England or elsewhere outside Canada." And again at p. 583:

"The whole matter may be put thus: The limitations of the legislative powers of a province expressed in sec. 92, and in particular the limitation of the power of legislation to such as relates to the incorporation of companies with provincial objects, confine the character of the actual powers and rights which the provincial Government can bestow, either by legislation or through the executive, to powers and rights exercisable within the Province. But actual powers and rights are one thing and capacity to accept extra-provincial powers and rights is quite another. In the case of a company created by charter the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an act not beyond its capacity, and is therefore not *ultra vires*, although such a violation may well give ground for proceedings by way of *scire facias* for the forfeiture of the charter."

The doctrine enunciated by the Privy Council in the *Bonanza Creek* case was subsequently adopted by the Legislature in the Ontario Companies Act, in what is now sec. 217, R.S.O. 1937, ch. 251, and which provides *inter alia*: "Every corporation or company heretofore or hereafter created by or under any general or special Act of this Legislature shall, unless otherwise expressly declared in the Act or instrument creating it, have, and be deemed from its creation to have had, the general capacity which the common law ordinarily attaches to corporations created by charter." See also *Honsberger v. Weyburn Town Site Co.* (1919), 59 S.C.R. 281; *Edwards v. Blackmore* (1918), 42 O.L.R. 105; *Ward v. Siemon* (1918), 43 O.L.R. 113, and *Basil v. Spratt* (1919), 44 O.L.R. 155.

Lake Shore Mines Limited has a transfer agency and a register of shareholders in Buffalo, New York, and it must be presumed that it is legally there under the laws of the State of New York. Whatever right or power the foreign jurisdiction has bestowed on it it has the capacity to accept and I can find nothing in the Ontario Companies Act or the Letters Patent expressly declaring otherwise.

The case mainly relied upon by counsel for the Attorney-General in support of his position is *Erie Beach Company Limited v. Attorney-General for Ontario*, [1930] A.C. 161. In that case the company was one incorporated under the Ontario Companies Act. It conducted the business of an amusement park at Fort Erie, Ontario. Its head office was at Fort Erie very close to Buffalo, New York. Its principal shareholder was one Bardoll. All meetings of directors and shareholders were held at Buffalo and all its books were kept at Buffalo. When Mr. Bardoll died the Treasurer of Ontario claimed succession duty on the shares of the company owned by him even though it was admitted he was domiciled in Buffalo and the share certificates were physically situate in Buffalo. The important difference between this and the case at bar was that the Erie Beach Company had no transfer office in New York, and in addition its By-law No. 22 provided as follows:

"Shares of stock in the company shall not be transferable without the consent and approval of a quorum of the Board of Directors. The shares of the company shall only be transferable by the recording on the stock book of the company at the head office of the company, or at the office of the company's transfer agents, if any, by the shareholder or his or her attorney, of the transfer thereof and the surrender of the certificate of such share, if any certificate shall have been issued in respect thereof, and upon the making of such transfer in the books of the said company the transferee shall be entitled to all the privileges and subject to all the liabilities of the original shareholder, provided that the directors, in case any certificate of share shall have been lost, may in their discretion accept and cause to be recorded the said transfer without the production of the original certificate."

Section 56 of the Ontario Companies Act provides:

"(1) The shares of the company shall be deemed personal estate and shall be transferable on the books of the company in such manner and subject to such conditions and restrictions as by this Act, the special Act, the letters patent, supplementary letters patent or by-laws of the company may be prescribed."

Reading the section and the by-law together it must be evident that the by-law itself placed a restriction which made it necessary for a valid transfer to take place at the head office in

Ontario and that therefore the transfer could not validly take place any where else and *Attorney-General v. Higgins* applied. But the Judicial Committee apparently go further, unnecessarily I think with respect. The head note of the case, "That as by the Ontario Companies Act the shares of the company could be effectually dealt with only in Ontario, shares of which the deceased person resident in the United States was the registered holder were property situate in Ontario and liable for succession duty", is much too broad in its implication. If it was intended to suggest that an Ontario company could in no circumstance legally establish a transfer office and register in another jurisdiction, in my opinion such a conclusion could only be the result of an erroneous reading of the statute and by the adoption of a method of interpretation not in accord with the decision in the *Bonanza Creek* case. Of course if the head note is only intended to describe what was necessary to decide on the particular facts of the case, then a reference to the company's by-law with respect to transfer would have made the matter much more clear, because the by-law in conjunction with the provisions of sec. 56 would make it evident that, in the case of the particular company dealt with, the provisions of sec. 56 did make transfer ineffectual at any place other than the company's head office in Ontario. In Lord Merrivale's reasons it is stated that the then sec. 118 required the company to keep the company's register of shareholders at its head office within Ontario. Sections 101 and 102 are the corresponding sections in the present Act. By sec. 101 the corporation is required to cause its secretary to keep a book or books containing certain records, and by sec. 102 these are required to be kept at the head office. Whatever the purpose of the sections may be I cannot read into them a prohibition against an Ontario company keeping its register of shareholders at any other place so long as it keeps a record of the particulars required by sec. 101 at its head office.

It is my view that the situs of the shares in question is where the register is at Buffalo since the shares could be effectively dealt with there without anything further to be done in Ontario. Once the transfer is made at the Manufacturers and Traders Trust Company in Buffalo the company cannot require anything further to be done in Ontario. Besides this the Courts in New York could as against the company compel the transfer of the

shares in that jurisdiction. At least it has been so laid down: *Lockwood v. U.S. Steel Corporation* (1913), 209 N.Y.R. 375, and *Travis v. Knox Terpezone* (1915), 215 N.Y.R. 259.

Accordingly I think the suppliants should have a declaration that the Lake Shore Mines Limited shares are not subject to succession duty in Ontario, and a further declaration that they are entitled to refund of the sum of \$65,336.17, with interest at four per cent. from the 22nd day of July, 1935, and their costs.

Declaration made in favour of the suppliants.

[COURT OF APPEAL.]

Leeson v. The Village of Havelock.

Municipal Corporations—Ice and snow on sidewalks—Injuries sustained by pedestrian who stepped and fell on ice on sidewalk—Whether defendant municipality was grossly negligent.

By sec. 480(3) of The Municipal Act, R.S.O. 1937, ch. 266, it is provided that "except in case of gross negligence a corporation shall not be liable for a personal injury caused by snow or ice upon a sidewalk".

Although it is difficult to give any satisfactory definition of the meaning of gross negligence as distinguished from negligence, it does not follow from the difficulty of finding a precise meaning for it that the adjective "gross" in sec. 480(3) of the Act should be treated as devoid of meaning. The use of the adjective "gross" means that a municipal corporation is not to be liable for a personal injury caused by snow or ice upon a sidewalk unless it has failed not only to perform the duty of keeping the street reasonably safe for travel, but has been guilty of a gross or very great negligence in the performance of that duty.

Applying the foregoing principle it was held that the defendant municipality had, considering the size of the village, a reasonable organization and provisions made to carry out the obligations imposed upon it by the Act, and under the circumstances the fact that a relatively small portion of sidewalk where the plaintiff fell was in a slippery condition and was not sanded did not constitute gross negligence.

By sec. 480(4) of The Municipal Act, R.S.O. 1937, ch. 266, it is provided that no action shall be brought against a municipal corporation for damages caused by the non-repair of a highway "unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered post to the head or the clerk of the corporation . . . in the case of an urban municipality within seven days after the happening of the injury".

Semble that sec. 480(4) is complied with if the notice is posted by registered mail within seven days after the happening of the injury although the notice does not reach the head or the clerk of the corporation until after the expiration of seven days.

AN action to recover damages for personal injuries sustained by the plaintiff as the result of a fall on a sidewalk in the defendant municipality.

The action was tried by ROACH J., without a jury, at Peterborough.

W. J. Fair, for the plaintiff.

T. N. Phelan, K.C., for the defendant.

January 8th, 1940. ROACH J.:—The plaintiff is a merchant carrying on business in the Village of Havelock. On March 17th, 1939, about two-thirty o'clock in the afternoon, while walking from his store to the bank along Oak Street, he slipped on some ice on the sidewalk and fractured the femur in his left leg close to the hip joint. He brings this action to recover damages alleging gross negligence on the part of the municipality.

As to what constitutes gross negligence in cases of this kind, it will suffice to quote the words of Fisher J.A. in *Huycke v. Cobourg*, [1937] O.R. 682, at p. 690:

"The law is well settled that if a municipality permits a slippery, icy sidewalk in a thickly peopled part of the municipality to remain unprotected or ignores it altogether, and some one is injured, that would constitute gross negligence. But in my opinion if a municipality has given ordinary and careful attention by sanding, and, notwithstanding, an accident happens, if there was any negligence it would not be gross but ordinary, and, if ordinary, under the statute, no liability"; and the words of McTague J.A. in the more recent case of *Harper v. Prescott*, [1939] O.W.N. 492:

"When it comes to applying the principle, in general what a plaintiff has to prove under our statute is that there was a breach of the duty to keep the sidewalk reasonably safe for pedestrians using same reasonably and that the breach of that duty approaches the wilful, the reckless, the wanton; the breach must be flagrant. Mere proof of negligence in the breach is not sufficient."

Do the facts in the present case constitute gross negligence as thus defined?

The Village of Havelock has an area of about 400 acres, a population of 1,156 persons, and about five miles of paved sidewalks. At the southerly edge of the municipality are the railroad yards running east and west. Adjoining the railroad property on the north and running parallel with it is Ottawa Street which is a part of Provincial Highway No. 7. Oak Street begins at Ottawa Street and runs north to the northerly limit of the village and is the centre street of the village. The C.P.R. station is on the south side of Ottawa Street near the foot of Oak Street. On the north-east corner of Oak and Ottawa Streets is the post office and there are stores along the north side of Ottawa Street in the block east of Oak Street and also along the east side of Oak Street in the block north of Ottawa Street. George Street is the first street north of Ottawa Street and also forms part of the business section of the village. It is a reasonable conclusion on the evidence that there would be greater pedestrian traffic in and around the post office corner than anywhere else in the village.

On the afternoon in question the plaintiff walked from his store westerly along Ottawa Street to the post office corner and thence northerly along the east side of Oak Street, and he fell when he had reached a point about four or five feet north of the post office building. The building does not cover the entire post office lot. At the rear of the building, that is to the north, is a vacant area extending along Oak Street a distance of fifty or sixty feet. Vehicles delivering and receiving mail, including those of the rural mail carriers, are driven from Oak Street into this area to the rear of the post office. The plaintiff fell opposite this area. At the time he fell he was wearing rubbers which had reasonably good soles.

The weather conditions from March 15th to March 17th, both dates inclusive, are shown in a diary kept by a youth, a student, in Havelock, the accuracy of which was accepted by counsel for both parties. It showed the temperature and precipitation to have been as follows:

March 15th—	8.10 a.m.	18	degrees	above	zero—cold.
	12.20 noon	30	“	“	“ —rain.
	4.40 p.m.	38	“	“	“
March 16th—	8.00 a.m.	18	“	“	“ —cold.
	12.20 noon	22	“	“	“
	4.20 p.m.	16	“	“	“
	9.00 p.m.	14	“	“	“
March 17th—	8.00 a.m.	18	“	“	“ —cold.
	12.20 noon	24	“	“	“ —light snow.
	4.20 p.m.	22	“	“	“ —light snow.

There is also evidence of several witnesses including the reeve of the municipality that on March 15th it rained causing a slushy condition and that late that night or early in the morning of March 16th it turned much colder and froze the slush so that by daylight on March 16th, using the words of the reeve as I noted them, “everything was a sheet of ice”. The roads and the sidewalks were the same, or to use the words of William Laing, the village constable, “there was ice all over”. Between then and the time when the plaintiff fell the temperature was fairly uniformly cold. There was, of course, some variation in the temperature but not any intermittent freezing and thawing such as would mitigate against the efficacy of sanding once it had been done, or to cause the sand to be absorbed by or disappear in slush. The reeve stated in evidence that he was certain that

it was thawing on the sidewalk along the north side of Ottawa Street at noon on both the 16th and 17th in the direct rays of the sun. If there were any soft spots along Ottawa Street I should think, having regard to the recorded temperatures, that they would not be such as to overcome the effect of sanding previously done. The reeve made that statement under pressure of cross-examination and perhaps without too careful or accurate recollection. In any event I am satisfied there was no such "thawing" on Oak Street in the area where the plaintiff fell. I refer to this fact particularly because of some conflict of evidence as to sanding on Oak Street to which I will refer later.

The municipality had some facilities for sanding the streets. Some sand had been stored inside the firehall adjoining the town hall which was two blocks up Oak Street from the post office; there was no regular staff to do the sanding; the work was distributed among the unemployed as a relief measure; in the neighbourhood of the town hall and in the business section the sand was carried in containers on hand sleighs and spread over the sidewalks; in the outlying districts trucks were used; the council as a whole, that is the reeve and four councillors, constituted a committee to look after the streets, and such work as sanding could be done with the sanction of any three members of the committee.

What then was done to meet the situation which presented itself on the morning of March 16th?

I turn first to the evidence of the reeve. He stated as follows: On the morning of the 16th everything was a sheet of ice. I contacted Messrs. Kitchen and Chiles (two of the councillors) and we decided to sand. I engaged one, Russell, and his truck. I also tried to hire one, Buchanan and his truck, but he declined, and failing to get him I did not try elsewhere. Russell's truck was loaded with sand at the firehall, and he was sent to the outskirts between 9 and 9.30 o'clock with instructions to sand from one end of the village to the other . . . We also had men out sanding with pails. At about one-thirty o'clock that afternoon I was at the post office and I noticed they had sanded along Ottawa Street. I then went north along the east side of Oak Street and observed that it also had been sanded. Nothing more was done until after the plaintiff's accident.

Before considering the other evidence, I should observe that on the east side of Oak Street about half way between Ottawa

Street and George Street is a barber shop. On the afternoon of March 17th when the plaintiff fell, the sidewalk on Oak Street alongside the post office building (not including the vacant area at the rear of the building) and the area in front of the barber shop had been cleaned off down to the pavement.

I turn now to the other evidence as to sanding.

Herbert B. Puffer, clerk and treasurer of the defendant municipality, called by the defendant, swore that he had been on the east side of Oak Street twice on the 17th; that there was sand on the sidewalk from George Street south to the barber shop but from the barber shop to Ottawa Street he did not see any sand.

Theodore Quinn, an electrician by trade but during the winter of 1938-9 unemployed, was called as a witness by the plaintiff. He had been engaged on some occasions prior to March 17th to do some sanding. He stated that on the morning of the 17th about 9.30 o'clock he had slipped on Ottawa Street opposite the post office. About an hour later he spoke to Councillor Chiles and reported that "the street in front of the post office needed sanding". About 2.30 o'clock that afternoon the reeve instructed him to sand the street in the block around by the post office. He immediately carried out these instructions. He sanded the sidewalk on the north side of Ottawa Street commencing at the post office and going east and around the block to George Street and from George Street he sanded both sides of Oak Street south to Ottawa Street. Describing the condition of the sidewalks which he then traversed, he stated they were covered with rough frozen slush, except on the east side of Oak Street where the ice was smooth, and that they were treacherous.

Don Kennedy was walking north on the east side of Oak Street returning from the post office. He was a little distance ahead of the plaintiff. He stated in evidence that the sidewalk was very icy; that for two days it had been very slippery; that he had great difficulty keeping on his feet and that there was no sand on the sidewalk. He was referring to Oak Street between George and Ottawa Streets. When the plaintiff fell, Kennedy came to his assistance.

Bert McNeely coming out of the post office saw the plaintiff after he had fallen and also came to his assistance. He swore that the sidewalk was very icy where the plaintiff fell and that he "saw no sand at all".

Harold Adley also came out of the post office as McNeely and Kennedy were assisting the plaintiff. He went to them and, describing the condition of the sidewalk on Oak Street, stated: "I had a hard time holding my feet as I walked up the street; the street was treacherous and there was no sand on it".

Police Constable Laing swore that he had been on Oak Street in the vicinity of the post office on both the 16th and 17th and on neither day did he see any sanding done there until the afternoon of the 17th after the plaintiff had fallen. He was very positive that if there had been sand there on the 16th, as the reeve stated there was, he would have seen it.

The great preponderance of evidence is that Oak Street, certainly from the barber shop south to Ottawa Street, was in a very treacherous condition and, notwithstanding the reeve's evidence to the contrary, I think the conclusion is irresistible that it had not been sanded from the freeze-up in the early morning of the 16th until after the plaintiff had fallen.

As might be expected in a place as small as the defendant municipality, news of the accident to the plaintiff spread quickly. Councillor Chiles and the reeve heard about it soon after it happened. It is reasonable to expect that they would at once cause inquiries to be made to ascertain if Oak Street in that area had been sanded, and if so, who had done it. Yet no one is called to say that he sanded that section on the 16th nor was anyone, excepting the reeve, called to say that there was any sand on that part of Oak Street from the morning of the 16th until the plaintiff fell. The reeve stands alone and I have concluded that he was entirely mistaken when he stated in evidence that he observed sand on that part of Oak Street shortly after noon on the 16th. If there had been sand there after noon on the 16th it seems strange that none was visible twenty-four hours later.

The attitude of the council toward the municipal corporation's obligation to give "reasonably careful attention to the streets by sanding", particularly in view of the treacherous condition which existed on the morning of the 16th, is manifest from the actions of the reeve that morning. He evidently thought that the conditions demanded that two trucks and crews be sent out to sand the streets. He engaged one truck, but when the second truck owner with whom he had communicated declined to accept the work the reeve did nothing further about it. Further, when

Theodore Quinn, who undoubtedly would have been glad to get the work, notified Councillor Chiles about 10.30 o'clock in the morning of the treacherous condition of the sidewalk in the neighbourhood of the post office, it took four hours before any instructions were given him to do the work. When, as in this case, there is material on hand just two blocks from the treacherous area and a man available to do the work, and the warning of the danger given, and four hours elapse before any instructions are given that man, in my opinion that indicates an attitude approaching a callous indifference. I am not unmindful of the fact that when Quinn notified Councillor Chiles in the morning he referred to "the street in front of the post office", but it is significant that when the reeve finally instructed Quinn he told him to sand "the street and block around by the post office". It is a fact that Councillor Chiles did nothing as a result of Quinn's warning. He heard of the accident to the plaintiff and then aroused himself and telephoned the reeve and as a result the reeve gave instructions to Quinn.

In my opinion the facts in this case come squarely within the definition of gross negligence as stated by Fisher J.A. and McTague J.A. in the cases cited.

This is not a case where sanding was done ineffectively. It was not done at all on a considerable portion of the busiest, or, at least, one of the busiest streets in the village.

Mr. Phelan argued that the plaintiff had not complied with the statutory provision respecting notice of the claim and injury. The Municipal Act, R.S.O. 1937, ch. 266, sec. 480(4), is as follows:

"No action shall be brought for the recovery of the damages mentioned in subsection 1 unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered post to the head or the clerk of the corporation . . . in the case of an urban municipality within seven days after the happening of the injury" In this case the notice was sent by registered post addressed to the clerk of the corporation. It was posted in the post office at Havelock in the morning of March 24th. It was received by the clerk at the post office on the morning of March 25th.

I should have thought that the dispatching of the notice by posting it in the post office within the seven days was a compliance with the requirements of the statute.

As lending some assistance in the interpretation of the section, Mr. Phelan referred to *Browne v. Black*, [1912] 1 K.B. 316. The statutory requirement there to be construed was The Solicitors Act 1843, sec. 37 of which provided that no solicitor shall commence any action for the recovery of any fees, charges or disbursements "until the expiration of one month after . . . such solicitor . . . shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting house, office of business, dwelling house, or last known place of abode, a bill of such fees, charges and disbursements." It was there held by a majority of the Court of Appeal that a bill is not "sent by the post" to the party to be charged one month before the action unless it was posted at such a time that it would in the ordinary course of post be delivered to the party to be charged one clear calendar month before the commencement of the action. That case was considered in *Retail Dairy Company Limited v. Clarke*, [1912] 2 K.B. 388. The statutory requirement there considered was sec. 20, subsec. 1 of The Sale of Food and Drugs Act 1899, which provided that "a warranty or invoice shall not be available as a defence to any proceeding under the Sale of Food and Drugs Act unless the defendant has, within seven days after the service of the summons, sent to the purchaser a copy of such warranty or invoice . . .". It was there held that if the copy of the warranty is posted to the purchaser within seven days from the issue of the summons it is "sent" in compliance with the requirement of the subsection. At p. 394 Ridley J., dealing with the decision in *Browne v. Black*, (*supra*) says:

"In that case the section contained words which indicated that the date on which the bill was received was the date from which the month was to run, and therefore there was a reason for the decision that the word 'sent' imported not merely the dispatch of the bill but the sending of it as such time that in the ordinary course of post it would be delivered a month before the action was brought."

I am not prepared to constrict the meaning of the words of our own statute by holding that they imply that the notice must be posted within such a time that it would ordinarily be received by the clerk or head of the municipality. I can conceive of a case where such a restricted interpretation would work an injustice on a pedestrian who is injured by reason of ice or

snow on a highway due to gross negligence on the part of the municipality. For one of many reasons consideration of the statutory notice is delayed until the seventh day. On that day the clerk and head of the municipality are not available so that the notice cannot be delivered to either of them. Someone on behalf of the injured person spends the greater part of the day unsuccessfully looking for them. Failing to find them, the notice is posted in the post office on that day at an hour when ordinarily it would not be received by the addressee that day. The giving of the notice is mandatory, and if the narrow interpretation suggested is to be given to the section such posting would be too late and the legitimate claim of the injured party would be defeated.

In any event in the present case the notice was posted at a time on March 24th when it would ordinarily be received by the addressee. The clerk attended at the post office about one o'clock on that date, and it was not explained why, as one would ordinarily expect it to happen, he did not then receive the notice.

The plaintiff's injury was serious. He was confined to bed eight weeks. The injured leg is two inches shorter than the other one. At present he must use crutches and gets around with difficulty. He will always have to use a crutch or a cane to support the injured leg. He is seventy-seven years of age and until this accident happened had been active in the business which he and his son operated. He is mentally alert and unusually well preserved for a man of his years. His out of pocket expenses amount to \$280.00. I assess his damages for personal injuries at \$3,000.00.

There will therefore be judgment in his favour for \$3,280.00 and costs to be taxed.

The defendant appealed to the Court of Appeal from the judgment of Roach J.

April 3rd and 4th, 1940. The appeal was heard by RIDDELL, McTAGUE and GILLANDERS JJ.A.

T. N. Phelan, K.C., for the defendant, appellant, contended that the defendant municipality had not been guilty of a wilful breach of duty and that therefore there had been no gross negligence within the meaning of sec. 480(3) of The Municipal Act, R.S.O. 1937, ch. 266: *Harper v. Prescott*, [1939] O.W.N. 492; *Nix v. Godfrey*, [1936] 2 W.W.R. 497; *Short v. Rush*, [1937]

2 W.W.R. 191; *Forder v. Great West Railway Co.*, [1905] 2 K.B. 532.

In any event the plaintiff has not established that the absence of sand was the cause of the plaintiff's injury: *Huycke v. The Town of Cobourg*, [1937] O.R. 682.

The defendant discharged its duty to the plaintiff when its officers ordered that that sanding be done on March 16, and any failure to sand at the particular place where the plaintiff fell could not be deemed gross negligence on the part of the defendant.

The plaintiff's action fails by reason of the failure to deliver the notice required by sec. 480(4) of the Act: *Browne v. Black*, [1912] 1 K.B. 316.

W. J. A. Fair, for the plaintiff, respondent, relied upon the findings of fact made by the learned trial Judge and submitted that the defendant had been grossly negligent in failing to sand a substantial portion of the sidewalk in question. The notice was mailed within seven days and therefore sec. 480(4) of the Act was complied with.

The Court, at the conclusion of the argument, gave judgment allowing the appeal with costs and on a subsequent date reasons for judgment were delivered.

June 17th, 1940. GILLANDERS J.A.:—On April 4th, 1940, the Court gave judgment allowing this appeal with costs and dismissing the plaintiff's action with costs. I feel that I should briefly indicate in writing my reasons for agreeing in that result.

This was an appeal from a judgment of the Honourable Mr. Justice Roach delivered January 8th, 1940, awarding to the plaintiff damages in the sum of \$3,280.00 for injuries received when he slipped and fell on ice on a sidewalk in the defendant village and fractured the femur of his right leg close to the hip joint.

The facts are clearly and fully set out in the judgment appealed from and need not here be set out with the same detail.

About 2.30 p.m. on March 17th, 1939, the plaintiff, a man 77 years of age, after proceeding from his place of business on the north side of Ottawa Street turned north at the post office which fronts on Ottawa Street and walked northerly on the sidewalk on the east side of Oak Street on his way to the bank. He says that the sidewalk on Oak Street opposite the post office

building was clear of ice and snow and bare to the concrete, but after he proceeded over this clear portion of the walk opposite the post office building and passed the point where a walk enters the back door of the post office the sidewalk was icy. He proceeded on this icy portion and a very few feet north of this point fell with the unfortunate result indicated.

No question arises as to the plaintiff's injury or the assessment of damages. The matter in question is the liability in law of the defendant municipality. As stated by the learned trial Judge in his clear and full judgment, the Village of Havelock has a population of 1,156 persons and has about five miles of paved walks, and further:

"The municipality had some facilities for sanding the streets. Some sand had been stored inside the firehall adjoining the town hall which was two blocks up Oak Street from the post office; there was no regular staff to do the sanding; the work was distributed among the unemployed as a relief measure; in the neighbourhood of the town hall and in the business section the sand was carried in containers on hand sleighs and spread over the sidewalks; in the outlying districts trucks were used; the council as a whole, that is the reeve and four councillors, constituted a committee to look after the streets, and such work as sanding could be done with the sanction of any three members of the committee." It might be added that the evidence shows that the total revenue of the village for the year 1939 was a little less than \$18,000.00 and that the actual expenditure of municipal funds for the care and safety of sidewalks for the winter of 1938-1939 was \$650.00, which did not include the costs of materials and other items which it is said would bring the total to over \$700.00.

As to the weather conditions of importance in considering the defendant's duty, the trial Judge states after setting out a record of temperatures and conditions accepted as accurate by both parties, "There is also evidence of several witnesses that on March 15th it rained causing a slushy condition, and late that night or early in the morning of March 16th (using the words of the reeve as I noted them) 'everything was a sheet of ice'. The roads and sidewalks were the same, or, to use the words of William Laing, the village constable, 'there was ice all over'. Between then and the time when the plaintiff fell the temperature was fairly uniformly cold."

The evidence shows that on the morning of March 16th after the reeve had spoken to two of the councillors it was decided to sand the streets of the village. He engaged a man with his truck and instructed him to proceed with this work and also tried to engage another man with his truck but was unable to get him. The man engaged was told to sand from one end of the village to the other, and started this work between 9.30 and 10 a.m. Men were also at work sanding from pails. The reeve testified that he made observations in the afternoon and that sand had been put on Ottawa Street and Oak Street. However, after a review of the relevant evidence the learned trial Judge finds that the portion of Oak Street from the barber shop on Oak Street (about half way up the block) to Ottawa Street was in a treacherous condition and had not been sanded from the freeze-up in the early morning of March 16th until after the plaintiff had fallen about 2.30 on the afternoon of the 17th. In this connection it should be borne in mind that as found by the trial Judge, supported by the plaintiff's evidence, "the sidewalk along side the post office building (not including the vacant area at the rear of the building) and the area in front of the barber shop had been cleaned off down to the pavement." It is therefore evident that this portion of the walk was bare and clear of ice and snow and the slippery portion was apparently from the rear of the post office building to the area in front of the barber shop which had also been cleaned. As to this portion there is ample evidence indicating that at this location there was smooth ice and an absence of sand.

It is noted that a witness, Quinn, made a complaint about 10.30 a.m. on the morning of the 17th that "the street in front of the post office is very treacherous" and "needed sanding". This evidently referred to the portion of Ottawa Street in front of the post office and not to the location where the plaintiff fell. About 2.30 in the afternoon, after the plaintiff's accident, Quinn was engaged "to sand the block around the post office".

The first question that arises is whether or not on these facts the defendant municipality was guilty of the gross negligence required by the statute to found liability. It is unnecessary to discuss at length the law in this respect. The learned trial Judge mentions and quotes from several instructive cases of the considerable number reported dealing with the law in this connection.

In his book on Municipal Negligence the late Judge Denton at page 156 refers to an unreported decision of Mr. Justice Street in the case of *McLean v. Ottawa*, dated 4th October, 1899, where, in part, that learned Judge said:

“It is no doubt a difficult matter to give any satisfactory definition of the meaning of “Gross negligence” as distinguished from negligence, for the reason the word “Gross” is merely an adjective, not a term with an ascertained technical meaning, but it does not follow from the difficulty of finding a precise meaning for it that a mere adjective in an Act of Parliament is to be treated as devoid of meaning. The sense I place upon it as here used is that the corporation are not to be liable unless they have not only failed fully to perform the duty of keeping the street reasonably safe for travel, but have been guilty of a gross, or very great negligence in the performance of that duty.’”

It would appear that in a general way the municipality had not ignored the duty imposed by the statute but had under the circumstances, considering the size of the village, a reasonable organization and provisions made to carry out the obligations of the statute. A committee was set up for that purpose, materials and equipment were on hand, and following their practice when the freeze-up occurred men were engaged with reasonable promptitude and instructed to sand the streets.

To my mind the actions of the reeve on the morning of the 16th March indicate that he and his council were endeavouring to carry out their duty. Although he attempted to engage a second man and truck and failing did not inquire further it is not argued that the man and truck and men with pails engaged were insufficient to do the job assigned to them. Rather than indicating a disregard of his duties the evidence would seem to indicate a reasonable attempt to fulfil them. The fact that the complaint made by the witness Quinn at 10.30 a.m. on the 17th was not acted upon until after 2.30 p.m. may not, I think, indicate any attitude of indifference. The main question to be considered is whether the fact that the relatively small portion of walk where the plaintiff fell, that is the portion from the rear of the post office to the bare portion in front of the barber shop, was in a slippery condition and was not sanded does or does not under all the circumstances constitute gross negligence.

Keeping in mind that the adjective “gross” is not “devoid of meaning” and that the negligence to establish liability should

be at least "great", per Osler J.A. in *Ince v. Toronto* (1900), 27 O.A.R. 414, or as said in *Kingston v. Drennan* (1897), 27 S.C.R. 46, "very great", I cannot think it does.

The corporation did not ignore the condition on March 16th, but took reasonable steps to have the walks sanded. No complaint came to the corporation thereafter on which they should have acted respecting the particular place in question, and if at the time the plaintiff fell there was no sand on the spot where the accident occurred, whether due to this place having been missed, or for other reasons, I would hesitate to find that this would justify holding that the corporation is therefore guilty of gross negligence.

Even if one should be of opinion that under the circumstances disclosed the defendant municipality was guilty of gross negligence, I am of opinion that the plaintiff has another obstacle in his way to obtaining at least full compensation for the damages he sustained. The accident occurred in broad daylight, and before stepping from that portion of the sidewalk which was cleaned and bare on to the icy portion where he fell, it is clear from the plaintiff's evidence that he saw it and appreciated that it was icy and very slippery, and that this icy condition continued from that point up to the barber shop, he says probably a distance of 40 to 50 feet. It may not be incumbent upon pedestrians continually to watch the condition of the walk on which they are proceeding in order to guard against any dangerous condition that might be seen by such close observation, and, of course, at night or when slippery spots are hidden by reason of snow, one is often unable, even exercising much care, to avoid danger from ice; but, proceeding in broad daylight, when a pedestrian observes a portion of the walk in front of him covered with smooth ice, and to his knowledge slippery, I think he is bound to take reasonable care for his own safety under the circumstances. I cannot escape the conclusion that under the circumstances here the plaintiff, a man 77 years of age, observing the icy portion of the walk ahead of him might well, instead of proceeding on it as he did, have seen whether it might not be avoided and some safer footing found even with a few added steps or a little delay. Instead of that he chose to proceed and fell. He probably did not fully appreciate the danger attendant upon what he did, and while I would not feel inclined to hold that he was wholly "volens", I think that he was guilty of negligence contributing to

his own misfortune. If it were held that the circumstances warranted a finding of gross negligence against the municipality, I would hold that the plaintiff was equally guilty and should therefore recover only 50 per cent. of the amount at which his damages were assessed.

A pedestrian under somewhat different circumstances was held guilty of contributory negligence in *Burgess v. Town of Southampton*, [1933] O.R. 279.

Argument was addressed to us by counsel for the appellant that the notice of the claim of injury given to the defendant municipality was defective in that it was not posted in time to be in compliance with the provisions of the statute. This question is dealt with at some length by the trial Judge.

If, in my opinion, the plaintiff were otherwise entitled to succeed, I would be very loath to give effect to the appellant's argument under the circumstances in this case. I am in agreement with the view of the learned trial Judge on this point.

For the reasons indicated I was of opinion the appeal should be allowed with costs, and the action dismissed with costs.

RIDDELL and McTAGUE JJ.A. agreed with GILLANDERS J.A.

Appeal allowed with costs.

[COURT OF APPEAL.]

Guindon v. Julien.

Negligence—Occupiers of premises—Action by wife of tenant of rooms in a building against the owner of the building to recover damages for personal injuries caused by fall on stairway—Alleged defective condition of door knob on door at top of stairway—Whether plaintiff was a licensee with an interest or a licensee without an interest—Extent and scope of the duty of care of the defendant—Traps—Knowledge of defendant.

The plaintiff, who was the wife of a tenant of certain rooms in a building owned by the defendant, brought this action to recover damages for personal injuries caused by a fall which she sustained on a stairway in the defendant's building. The plaintiff alleged that as she was closing a door at the top of a stairway a screw in the door knob broke, with the result that the door knob came off in her hand and she fell downstairs. The plaintiff and her husband had lived for several years on the premises and were familiar with the staircase.

Held, that the defendant was not liable for the injury sustained by the plaintiff for the following reasons:

- (1) The plaintiff was a mere licensee entitled to use the premises and was not a licensee with an interest. Since the plaintiff was a mere licensee the defendant was responsible to her only for such dangers as were actually known to him, and the defendant did not know that the door knob was in danger of coming off: *Hambourg v. The T. Eaton Co. Ltd.*, [1935] S.C.R. 430; *Addie v. Dumbreck*, [1929] A.C. 371; *Sutcliffe v. Clients Investment Co. Ltd.*, [1924] 2 K.B. 746, considered.
- (2) The case was not one of a concealed trap. There was nothing apparent, and it could not be said of the defendant that he ought to have known something which was not apparent and which did not take place until the plaintiff by her action in closing the door broke the screw and thus produced the danger.

AN appeal by the defendant from a judgment of Chevrier J. whereby the plaintiff was awarded the sum of \$1,437.00 and the costs of the action.

May 23rd and 24th, 1940. The appeal was heard by MIDDLETON, MASTEN and McTAGUE JJ.A.

Evan Gray, K.C., and *J. A. Burrows*, K.C., for the defendant, appellant.

A. Lemieux, K.C., for the plaintiff, respondent.

June 4th, 1940. MIDDLETON J.A.:—An appeal from the judgment of the Honourable Mr. Justice Chevrier dated the 1st day of February, 1940, awarding to the plaintiff the sum of \$1,437.00 and costs as compensation for injury sustained by her on the 21st day of March, 1938, in a fall down the stairway in a building upon the premises known as 209 Guigues Avenue in the City of Ottawa where the plaintiff resided with her husband, the tenant of two rooms in the building. The defendant is the landlord of the premises in question, he having purchased the same subject to the tenancy of the plaintiff's husband.

The plaintiff and her husband occupy two rooms under a verbal agreement or lease made by the owner of the premises and the plaintiff's husband. These rooms are on the second flat of the building and have no access to the street save that afforded by the staircase in question. This staircase is enclosed and is reached from the second flat by a door which is in the same line as the stairs and opens away from the stairs. The door has an ordinary catch or lock which is operated by an ordinary door-knob passing through the lock and the door upon a swivel to which the knobs are attached in the ordinary way by screws entering holes in the swivel. On the day in question the plaintiff, being about to go downstairs, opened the door and entered the passage which was occupied by the staircase. This was approximately the full width of the door, and was twenty-seven inches from the door to the first step. The lady's account of what took place seems to have been entirely credited by the trial Judge. She contends that she opened the door a space, which she estimates at five inches, into the hall and, turning around with the view to going down the steps, she sought to close the door behind her and the door-knob came off in her hand by reason of the breaking of the screw which attached it to the swivel, and although she had twenty-seven inches between the door and the staircase she fell down the stairs and in the result sustained a dislocation of her arm. The cause of the knob coming off was the breaking of the screw which then occurred. She sues the defendant for the damages that she suffered, and in the result Mr. Justice Chevrier, accepting her story, has awarded her \$1,437.00 damages. From this judgment the defendant has appealed.

We all think that this appeal must succeed and the plaintiff's action must be dismissed. We think that upon the evidence the unfortunate accident to the plaintiff cannot be said to have been caused by the defect in the screw in the door handle. The natural and logical consequence of pulling the door handle off would not have been to cause the plaintiff to fall downstairs. She was standing at the top of the staircase and the door itself could not have required the exercise of much energy to close it. The door opened away from the staircase, and she had twenty-seven inches of a platform on which to stand before the staircase began. The staircase was provided with a hand rail extending from the top of the stairs to the bottom for her to hold if she needed. The plaintiff was thoroughly familiar with the situation, having

lived for some years in the premises. The defendant did not know nearly as much about the premises as he only came to them once a month for the purpose of collecting his rent. All that was apparent to the defendant was that according to the plaintiff the door-knob moved a little, showing, as her counsel argues, that it was cutting in to the neck of the screw, but this was not apparent to the defendant and was not known by him. It was not observed by the plaintiff, who used these stairs many times a day, nor to her husband, and was not anything that the defendant was called upon to observe.

But quite apart from this, in the case of *Hambourg v. The T. Eaton Co. Ltd.*, [1935] S.C.R. 430, which apparently escaped the attention of the plaintiff's counsel, the holding of the Court was that to make the landlord liable for a concealed damage it must be shown that he knew of the defective condition of the thing leased, and neglected to take care. The words, in a statement of the rule in many cases, are "he ought to have known", which means, according to the decisions there referred to, he was under an obligation to know, and neglected to discharge his duty. If there was no duty cast upon him by his contract, it cannot be said that he ought to have known the true state of affairs. Here there was no complaint. There was nothing apparent, and it cannot be said of the defendant that he ought to have known something which was not apparent and which had not taken place until this lady by her action in closing the door broke the screw and thus produced the danger. The case is not one of a concealed trap; it was not a trap at all, and the defendant cannot be made liable in this way to a mere licensee without an interest.

The case in the Supreme Court is binding upon us, and we have no desire in any way to interfere with it. The appeal is therefore allowed and the action dismissed with costs.

MCTAGUE J.A. agreed with MIDDLETON J.A.

MASTEN J.A.:—This is an appeal from the judgment of Chevrier J., dated 1st day of February, 1940, whereby after a trial without a jury he found the defendant liable to the plaintiff in the sum of \$1,437.00. The claim arises out of an accident to the plaintiff suffered in falling down a flight of stairs, she alleging that the defendant is responsible for the accident.

Many of the facts and circumstances connected with the occurrence are not in dispute. On the 21st March, 1938, the defendant was the owner of premises Number 209 Guigues Avenue, in the City of Ottawa, which he rented to various separate tenants, including the husband of the plaintiff. The defendant had purchased the premises some six months before the occurrence in question. The plaintiff and her husband were then, and had been, living in the premises for one or two years prior to the time when the defendant acquired them. I agree with the findings of the trial Judge:

1. That a verbal agreement for the lease of two rooms only, on the second storey of the premises in question, for a monthly rental of \$10.00, was entered into between Joseph Guidon, the husband of the plaintiff, and the appellant, and the plaintiff was not a tenant of the appellant.

2. That a stairway and a corridor leading from the street to the said two rooms constituted the only means of ingress and egress to and from the said rooms to the street, and were common to all the other tenants whether located on the second storey or on the third storey of the premises.

3. That the said stairway and corridor formed no part of the leased rooms, but were at all times in the possession, care and under the control of the defendant.

4. That at the top of the said stairway was a door opening inwardly into the corridor.

On the occasion when the accident in question occurred the respondent, who occupied these lodgings along with her husband, was proceeding from them to the street, and having passed along the corridor, opened the door above mentioned for that purpose. On attempting to close the door the catch of the door fastening did not engage when she pulled it to on the first occasion and the door opened some five or six inches, whereupon she proceeded to close it by pulling it toward her while she stood on a platform or step, some twenty-seven inches wide, on the outside of the door. When performing this operation the knob of the fastening, which she was holding in her hand, came off, and she alleges that in consequence she lost her balance and fell down the stairway, receiving the injuries for which this action is brought.

It is admitted that the fastening or lock had been loose (whatever that means) for a considerable time. It is alleged on behalf of the respondent that the door-knob came off because a screw

which held it to the spindle of the lock broke off. Neither the door-knob, the spindle or the screw was produced at the trial, though Exhibits 7 and 8 were produced as illustrating their condition.

The respondent submits that she stood in the relationship of a tenant to the appellant because the rental due under the agreement with her husband was paid by the Unemployment Bureau of Ottawa, and that in consequence the respondent stood in a contractual relationship to the appellant. I am of the view that such payment did not create any relationship of landlord and tenant between the appellant and plaintiff, and that this action, if maintainable, can only be asserted as a claim for negligence, namely, breach of the duty owed by an owner in possession.

Counsel for the appellant in his argument raised three points:

1. That the relationship of the respondent to the appellant was that of a mere licensee.

2. That the appellant owed no duty to the respondent to repair, but that as a mere licensee she was bound to use the premises as she found them and there was no trap.

3. That on the evidence the respondent failed to take reasonable precautions and care for her own safety, and that the accident arose from her own failure in this regard.

On the point first mentioned I agree with the contention of the appellant that she was a mere licensee entitled to use the premises, and that she was not a licensee with an interest. The law on that question was recently declared by the Supreme Court of Canada in the case of *Hambourg v. Eaton*, [1935] S.C.R. 430, at p. 435, where it is said, "I am of opinion that the Appeal Court was right in holding upon the evidence that the relationship between the respondent and the appellant was that of a mere licensee without an interest, the latter not having entered the auditorium upon business which concerned the respondent upon the respondent's invitation, express or implied. In such circumstances the appellant, in my judgment, does not fall within the rule which was applied in *Indermaur v. Dames* (1866), L.R. 1 C.P. 274, L.R. 2 C.P. 311, or in the later cases of *Holmes v. Northeastern Ry. Co.* (1871), L.R. 6 Ex. 123, and *Wright v. London & Northwestern Ry. Co.* (1876), 1 Q.B.D. 252 all of which treat a licensee with an interest as being entitled practically to the same degree of protection at the hands of the licensor as an invitee in the usual sense. To bring a person with-

in this category, however, it must be shown that he was upon the premises for some purpose in which he and the proprietor had a common or joint interest, as pointed out by Scrutton L.J. in *Hayward v. Drury Lane Theatre*, [1917] 2 K.B. 899, at 913, and by Viscount Dunedin in the Scottish appeal of *Addie v. Dumbreck*, [1929] A.C. 371." In the present case the respondent had no common interest with the landlord, but was, in my opinion as above stated, a mere licensee.

If I am right in the view that the respondent is a mere licensee, then the sole legal duty owed by the appellant to her is not to expose her to a concealed danger or trap: *Fairman v. Perpetual etc.*, [1923] A.C. 74, overruling *Miller v. Hancock*, [1893] 2 Q.B. 177.

However the trial Judge has found that appellant did expose the respondent to a concealed danger or trap, but I find myself unable to agree that any trap existed. What are the elements necessary to create a trap in the legal sense of that term? As applied by the trial Judge it consists in a dangerous condition of the premises which is not obvious to the licensee and which is known, *or ought to be known*, to the licensor.

In his reasons for judgment findings 11 and 12 read as follows:

"11. That on such occasions the conditions of said door knob and of the said defective screw were of such nature as to have been, or should have been apparent to the defendant so as to constitute to him notice of such defect, and of the dangerous situation resultant therefrom.

12. That the plaintiff knew that said knob was loose. But there being not a particle of evidence to show that she was aware that that constituted a dangerous situation. I do find as a fact that she was unaware of such dangerous situation."

Even assuming that the condition of the fastening constituted a trap (which I am quite unable to do), I find it impossible to understand that while the looseness referred to should have made it apparent to the appellant that the screw which broke was in a dangerous condition, yet that the same facts failed to make this same danger apparent to the respondent, particularly when the appellant had been on the premises only about six times altogether and the respondent was accustomed to use the door daily. But further, I am quite unable to understand how the looseness referred to in the evidence could possibly give notice to anyone that the screw was becoming worn and liable to break.

For these reasons I am of opinion that there was no trap.

I ought not, however, to part with the case without referring to the principle of law applicable in the case of a mere licensee. Having regard to the observations contained in the judgment of the Supreme Court of Canada in the case of *Hambourg v. T. Eaton Co. Ltd.*, [1935] S.C.R. 430, as well as those of the Court of Appeal in *Sutcliffe v. Clients Investments Company, Limited*, [1924] 2 K.B. 746, and to the view expressed in the 14th edition of Pollock on Torts at page 419, (Note R), in Salmond on Torts, 8th edition, pages 516 and 517, and Clerk & Lindsell on Torts, 9th edition at page 537, I am of opinion that the licensor is liable to a mere licensee only for such dangers as are actually known to him, and that the expression "ought to have known" has no application to the obligations of the licensor. In the present case the appellant did not know that the door knob was in danger of coming off.

Since writing the above reasons, I have had the opportunity of reading the judgment prepared by my brother Middleton, and in view of what he has said it is unnecessary for me to discuss further the questions that were argued before us.

I agree that this appeal must be allowed and the action dismissed.

Appeal allowed with costs.

[COURT OF APPEAL.]

Cork v. Greavette Boats Ltd.

Sale of goods—Contract for sale and purchase of a pleasure boat—Defects in boat—Implied condition that boat reasonably fit for particular purpose for which boat was required—Breach of implied condition—Whether purchaser had in fact accepted the boat—The Sale of Goods Act, R.S.O. 1937, ch. 180, secs. 15 and 34.

The plaintiff agreed to purchase and the defendant agreed to construct and deliver to the plaintiff a twenty-five-foot motor boat for the sum of \$4,000.00, and the plaintiff paid \$2,000.00 on account.

This action was brought by the plaintiff for rescission of the contract and the return of \$2,000.00 paid on account, on the ground that the motor boat when constructed and delivered by the defendant was defective and that there had been a breach of the implied condition contained in sec. 15 of The Sale of Goods Act, R.S.O. 1937, ch. 180, that the boat would be reasonably fit for the particular purpose for which the boat was desired, namely, for use as an ordinary pleasure boat on certain waters, the general nature of which was known to the defendant.

Held, on the evidence, that there were mechanical defects in the boat, that the boat was not in conformity with the contract, that there had been a breach of the implied condition that the boat would

be reasonably fit for the purpose desired and that the plaintiff had not accepted the boat; therefore the plaintiff was not confined to a claim for damages and was entitled to avoid the contract and recover the moneys paid on account.

AN action for rescission of a contract for the sale of a motor boat by the defendant to the plaintiff and for the recovery of \$2,000.00 paid on account.

February 20, 21, 22, 23, 24, 27, 28 and March 15, 1939. The action was tried by GREENE J., without a jury, at Toronto.

T. N. Phelan, K.C., for the plaintiff.

D. H. Porter, for the defendant.

August 24th, 1939. GREENE J.:—The action arises out of a sale under written contract of a motor boat by the defendant to the plaintiff. The plaintiff claims rescission of the contract and return of \$2,000.00 paid on account, on the ground that the boat was not reasonably fit for the purpose for which it was sold. He relies on sec. 15(a) of The Sales of Goods Act, R.S.O. 1937, ch. 180, which is as follows: "15. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows, (a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose; provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."

In the alternative the plaintiff alleges that the boat failed to comply with the written contract and claims damages. The defendant counterclaims for extras and \$2,000.00 unpaid balance of purchase price.

During the latter part of 1937 and early 1938 the parties were in negotiation resulting in a written contract being entered into, March 7th, 1938, for the sale of a boat at \$4,000.00.

I find as a fact that the purchaser relied on the vendor's skill and made known to the vendor the particular purpose for which the boat was desired, namely, for use as an ordinary

pleasure boat on certain waters, the general nature of which was known to the vendor. Mr. Porter argued that such was not a "particular purpose" within the section, but with that contention I cannot agree. If the purchaser now complained that the boat was not fit for the purpose of towing booms of logs, it would not take the vendor long to reply that the boat was sold for no such purpose but only for the purposes "particular" to an ordinary pleasure craft of this type. In *Baldry v. Marshall*, [1925] 1 K.B. 260, the subject matter of the dispute was a touring car which the purchaser was held entitled to reject because it was unsuited for touring purposes. It does not seem to me that there is any difference in principle between the touring car and the motor boat intended for somewhat similar purposes, one on land and the other on water.

Before discussing the general facts it is convenient to deal here with another question of law which arose from a clause in the contract as follows: "There are no understandings, agreements, representations or warranties, expressed or implied, not specified herein,"

Counsel for the defendant (the vendor) argues that this clause deprives the purchaser of the benefit of sec. 15(a) of The Sales of Goods Act, and confines him to the terms of the written contract. The question raised is important as the purchaser's remedies under the contract are contained in the following clause: "The new Greavette Runabout furnished by Greavette Boats, Ltd., is warranted to be free from defects in material and workmanship under normal use and service, our obligation under this guarantee being limited to making good at our factory any part or parts thereof, which shall within ninety days after delivery to the original purchaser, be returned to us with transportation charges prepaid and which our examination shall disclose to our satisfaction to have been thus defective";

The implied condition under The Sale of Goods Act has been considered in the following cases and held not to be excluded. "It is expressly agreed that there are no promises, agreements or undertakings outside of this contract": *Alabastine Co. v. Canada Producer & Gas Engine Co.* (1912), 30 O.L.R. 394. "No warranties are given with the goods sold by the society": *Clarke v. Army & Navy Co-operative Society*, [1903] 1 K.B. 155.

Perhaps the strongest wording of all is dealt with in *Baldry v. Marshall* (*supra*) at pp. 265 and 266. There the guarantee

was "against any breakage of parts due to faulty material", and contained the following, "Cars are sold on condition that the foregoing guarantee is accepted instead of and expressly excludes any other guarantee or warranty statutory or otherwise."

Bankes L.J., in reference to the above, says: "It is said by the use of that language the defendants meant to exclude conditions as well as warranties; but they have not done so, and if there is one thing more clearly established than another it is the distinction which the law recognizes between a condition and a warranty. . . . the defendants have not used the necessary language to exclude the implied condition . . . as to fitness for the particular purpose of which the plaintiff had given them notice."

In the case at bar the word "condition" is not used in the excluding clause, but counsel for the defendant (vendor) contends that the word "understanding" is comprehensive enough to embrace condition. He cites *Advance-Rumely v. Lester* (1927), 61 O.L.R. 4, where the condition as to fitness was excluded, but there the contract said, "There are no representations, warranties or conditions, express or implied, statutory or otherwise, other than those herein contained. . . ."

In excluding the implied condition as to fitness because of the above wording, Masten J.A., at pp. 26 and 27, specifically adopts the reasoning of Bankes and Atkin LL.J. in *Baldry v. Marshall* (*supra*).

The authority is overwhelming that to exclude the implied condition the wording must be clear beyond any doubt. I cannot agree that the word "understanding" is broad enough to include "condition", and consequently hold that the plaintiff (purchaser) is entitled to rely on the implied condition as to fitness.

On the 18th of June, 1938, the boat was put in the waters of Balsam Lake by the vendor and run under its own power to the purchaser's cottage some three or four miles away. There was no complaint as to operation, but several complaints as to minor matters such as finish of certain parts, type of steering wheel and absence of some accessories, but nothing of any importance. The boat was used a little on the 19th and no complaint except that the plaintiff found it hard to start. From June 20th to 25th the boat was in a boat house appurtenant to a

summer hotel called Cedar Villa, and accessible to anyone on the premises. There is no evidence that it was tampered with in any way, but the defendant presses the point that the operation of the boat was good on the day of delivery, and that it may have been tampered with during these six days by some meddlesome person.

Between that and July 1st the plaintiff used the boat on two or three occasions. The plaintiff himself says that on July 1st the boat hit the sand bottom in the harbour at Cedar Villa while paddling the boat into its slip. He minimizes the incident, but the fact remains that he made representations to the owner of the harbour and had a boulder in the harbour blasted out with dynamite. The defendant contends that the propeller received some injury which caused vibration, and such vibration was the cause of difficulties which the plaintiff experienced later with the boat. The evidence is conflicting and it is difficult to say whether the propeller suffered some injury at this time or not. On the whole I am inclined to think it did. The expert evidence on both sides agreed that slight damage to the propeller could cause serious vibration in the shaft and thus in the boat.

From then on the plaintiff experienced various difficulties with the boat and had various meetings with the representatives of the defendant company. The plaintiff says he told the defendant on July 10th it must take the boat back, but he admits that on July 12th it was agreed that the defendant was to send two mechanics to work on the boat. The mechanics worked on the boat from July 13th to July 17th which was a Sunday, and on that day the plaintiff Cork and the mechanics went on a fishing trip to Pigeon Lake some miles away from Balsam Lake. The evidence is conflicting as to whether it was a test run with Cork as a spectator or a fishing trip with Cork in command. Mr. Porter for the defendant cites sec. 34 of the Act: "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." He argues that the plaintiff had accepted the boat. I find that the plaintiff had not accepted the boat within the meaning of sec. 34. I also find that the plaintiff had not up to this time refused to accept

the boat. On this trip while in Pigeon Lake with Cork at the wheel the boat ran on a reef and the propeller was damaged.

Immediately after this incident the plaintiff repudiated the contract and demanded return of the money paid on account.

In my opinion the plaintiff was justified in complaining as to workmanship

- (a) in attaching the engine to the body of the boat;
- (b) in installing the exhaust system;
- (c) in installing the fuel tanks;
- (d) in installing the steering gear;
- (e) some minor matters in the electrical wiring and finish of the boat.

If my understanding of the evidence is correct the only things of any importance not corrected on the 17th of July were attachment of the engine to the frame of the boat and the installation of the exhaust system.

The plaintiff was not justified in my opinion in complaining as to

- (a) the engine not being mounted on rubber;
- (b) the non-installation of a manual system of starting the engine;
- (c) the size and strength of the propeller strut;
- (d) the absence of fore and aft battens;
- (e) installation of a system of controls for throttle and choke other than the brass rod and bell crank type.

The above items cover everything complained of in the statement of claim except as to the gear box. The plaintiff wrote into the contract in his own handwriting a special clause, number 14, as to the gear box. "14. It is further guaranteed that if noise exceeds that of ordinary motor and gear box of approximately the same value of the direct drive that another new boat will be supplied to buyer of specifications as close as possible to this boat in the direct or indirect drive at buyer's discretion."

The evidence indicated that the gear box was slightly more noisy than one of a direct drive, but the plaintiff made no complaint prior to repudiation and at no time before or since has he asked for a new boat under this special clause. The plaintiff discussed the boat in considerable detail at various times prior to signing a contract with the defendant, and quite evidently contemplated that the special gear box to be installed might develop more noise than one of a direct drive. He put clause 14

in the contract to protect himself against that contingency, but apparently did not consider the excess noise (if any) of sufficient importance to ask for relief under clause 14.

The real question to be decided is as to whether the plaintiff is entitled to rescission or to damages. In other words did the defendant fail in a "condition" of the contract or was it merely guilty of a breach of warranty? The distinction is discussed at some length by Meredith C.J.O., in *Alabastine v. Canada Producer* (*supra*), at p. 407, *et seq.*, and he quotes extensively from the judgment of Fletcher Moulton L.J. in *Wallis Son & Wells v. Pratt & Haynes*, [1910] 2 K.B. 1003, and [1911] A.C. 394, *inter alia* the following: "There are some [obligations] which go directly to the substance of the contract, or, in other words, are so essential to its very nature that their non-performance may be fairly considered by the other party as a substantial failure to perform the contract at all. On the other hand there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both classes are equally obligations under the contract, and a breach of any one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating the contract as completely broken by the non-performance, and (if he takes the proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract."

Did the defendant fail in something which goes to the substance of the contract so as to entitle the plaintiff to rescission of the contract? Mr. Phelan for the plaintiff cited several cases where rescission was granted. In *Gillespie Brothers & Co. v. Cheney, Eggar & Co.*, [1896] 2 Q.B. 59, coal was found to be wholly unsuited to bunkering steamers and ships of war which was the purpose made known to the vendor. In *Manchester Lines Ltd. v. Rea*, [1922] 2 A.C. 74, coal unsuitable to the purpose was also the subject matter of the dispute.

In *Alabastine v. Canada Gas* (*supra*) it was held that an engine was not reasonably fit for the purposes for which it was required, nor was it of the horse power called for in the contract.

In *Bristol Tramways v. Fiat Motors*, [1910] 2 K.B. 831, damages were asked and granted because certain motor buses sold for use in and near Bristol, a hilly country, were found to be unsuitable for that purpose.

In *Baldry v. Marshall* (*supra*) a car sold for touring purposes was found unsuitable as it was uncomfortable and there was no suggestion that it could be made suitable by a few changes.

In *Wallis, Son & Wells v. Pratt & Haynes* (*supra*), giant sainfoin seed was supplied instead of common English sainfoin seed, a totally different article.

In all these cases there was a fundamental failure in the article supplied which went to the substance of the contract. No such failure has been proven against the boat supplied by the defendant. The plaintiff's own expert, Mr. Benson, said everything could be put right for \$600.00. On cross-examination Mr. Benson modified some of his objections and while there were undoubtedly some deficiencies in the workmanship of installation, it is not inconsistent with the evidence that the plaintiff's difficulties with the boat was increased by bad handling on his part, and it is impossible to say that a damaged propeller from contact with the bottom was not also a contributing factor.

The plaintiff is not entitled to rescission, but is entitled to damages for defective workmanship. I think an allowance of \$300.00 should be ample to correct any deficiencies. The defendant must bear some responsibility for partial loss of use of the boat during the month that the plaintiff had it, and I allow the plaintiff \$200.00 in this connection.

In his defence to the counterclaim for balance of purchase price, the plaintiff repeats the allegations set up in his statement of claim. It is a matter of some importance as to whether the above amounts should be allowed to the plaintiff in the action, or as a deduction from the counterclaim of the defendant.

According to Cork's own evidence on July 12th he arrived at an arrangement with the defendant company by which it was to furnish two mechanics at once to put the boat into good shape and also leave one of the mechanics as long as he desired him. In addition thereto the company was to give the boat an overhauling in the autumn at Gravenhurst, and allow Cork \$500.00 on a future deal if he bought another boat from them. In my opinion on July 17th the defendant was living up to this arrangement, and the accident on that day in Pigeon Lake did not change the situation or provide any excuse for Cork to repudiate as he did. In the result the plaintiff has obtained nothing which he could not have obtained by deduction from the balance of purchase price even if the defendant had made default in the agreement of July 12th, which I have already found it did not.

For the foregoing reasons I allow the sum of \$500.00 to the plaintiff as a deduction from the counterclaim of the defendant.

I find in principle that the defendant is entitled to certain of the extras set forth in paragraphs 23, 24 and 25 of its counterclaim. The detail was not gone into at the trial and counsel for the defendant admitted that some of the items were not properly chargeable as extras. If the parties cannot agree on the amount, there will be a reference to ascertain the proper amount.

The plaintiff's action is dismissed with costs. There will be judgment for the defendant on its counterclaim for \$1,500.00, plus such amount as may be determined upon for extras, together with interest from the first day of August, 1938, and for its costs of counterclaim.

The plaintiff appealed to the Court of Appeal from the judgment of Greene J.

May 29 and 30, 1940. The appeal was heard by ROBERTSON C.J.O., HENDERSON and GILLANDERS JJ.A.

T. N. Phelan, K.C., for the plaintiff, appellant, contended that the learned trial Judge had erred in concluding that the plaintiff was not entitled to rescission but only to damages for defective workmanship. There was a breach by the defendant of the condition made applicable by sec. 15(a) of The Sale of Goods Act, R.S.O. 1937, ch. 180, and the learned trial Judge erred in directing himself that to warrant rescission the non-performance must be "fairly considered as a substantial failure to perform the contract at all". This was an entirely inaccurate test by which to determine whether or not the statutory condition as to fitness for the particular purpose for which the boat was required had been complied with.

The plaintiff never accepted the boat delivered in substitution for the boat which he contracted to buy and which, according to the facts as found by the learned trial Judge, was a different article. The plaintiff did give the defendant an opportunity to comply with the contract, but he at all times reserved the right to reject and he exercised that right on July 18th, 1938. Reference to *Grant v. Australian Knitting Mills*, [1936] A.C. 85; *Manchester Lines Ltd. v. Rea*, [1922] 2 A.C. 74; *Shandloff v. The City Dairy Co.*, [1936] O.R. 579; *Bristol Tramways v. Fiat Motors*, [1910] 2 K.B. 831; *Baldry v. Marshall*, [1925] 1 K.B.

260; *Wallis v. Pratt*, [1911] A.C. 394; *Touchette v. Pizzagalli*, [1938] S.C.R. 433.

D. H. Porter, for the defendant, respondent, contended that the operation of sec. 15(a) of The Sale of Goods Act was excluded by the provision in the contract that "there are no understandings, agreements, representations or warranties, express or implied, not specified herein": *Advance Rumely Co. v. Lester*, 61 O.L.R. 4, at p. 27; *Clarke v. Army and Navy Co-operative Society*, [1903] 1 K.B. 155. In any event there was no breach of a condition; any defects in the boat did not go directly to the substance of the contract and the boat delivered by the defendant was seaworthy and ran well.

The plaintiff accepted the boat within the meaning of sec. 34 of The Sale of Goods Act on one of the following dates: June 11th, June 18th, July 8th, July 12th or July 17th; having accepted the boat, the plaintiff is not entitled to claim rescission for breach of a condition.

Moreover, sec. 15(a) of The Sale of Goods Act does not apply because no "particular purpose" for which the boat was required was made known by the plaintiff to the defendant: Reference to *Preist v. Last*, [1903] 2 K.B. 148; *The Crompton and Knowles Loom Works v. Hoffman*, 5 O.L.R. 554; *Canadian Gas and Power Launches v. Orr Bros. Ltd.*, 23 O.L.R. 616; *Cammell, Laird & Co. v. Manganese Bronze and Brass Co.*, [1934] A.C. 402.

Cur. adv. vult.

June 19th, 1940. ROBERTSON C.J.O.:—I have had the privilege of reading the reasons for judgment of Henderson J.A., and I agree with him that the appeal should be allowed with costs, and that the appellant should have judgment for \$2,000.00 and costs of action. The counterclaim should be dismissed with costs. As this reverses the judgment of the trial Judge, Mr. Justice Greene, whose opinion is always entitled to respect, I desire to state briefly my reasons.

The appellant, a business man living in Toronto, has a summer home on one of our inland lakes. He desired a safe gasoline motor-launch to be driven by himself or by his wife in his absence, and he applied to the respondents, who are in the business of making and supplying motor-boats. After negotiations that spread over some little time and in the course of which appellant's requirements and the purposes for which the

boat would be used were discussed and made known to respondent, a contract in writing was entered into dated 7th March, 1938. By this contract respondent undertook to supply appellant with a 25-foot "custom-built runabout" according to specifications contained in or attached to the contract, for the price of \$4,000.00. Delivery was to be made on 14th May, 1938. As provided in the contract, appellant paid respondent two sums of \$1,000.00 each on account of the price, one on giving the order, the other when notified that the hull was complete. In June the motor-boat was delivered to appellant. The learned trial Judge has found that appellant never accepted the boat, but he has held that appellant should have accepted it, and he has held him liable for the balance of the purchase price, subject to an allowance of \$300.00 "to correct any deficiencies", and \$200.00 "for partial loss of use of the boat", after its delivery to appellant. In plain terms this means that in the opinion of the learned trial Judge, while appellant did not accept the boat, it was a boat that he was bound to accept under the contract. With respect, I am unable to agree with this conclusion.

It is not necessary to go in detail through the long story of the occurrences in the period of about one month between the delivery of the boat and its final rejection on 18th July. That there were many things to put right after respondent announced that the boat was ready for delivery cannot be disputed. Some were matters of appearance or convenience; others had to do with safety and efficiency. Appellant expended a good deal of time and effort in endeavours to obtain from respondent the attention necessary to put the boat in proper shape, but with indifferent success. On 12th July, when appellant had threatened finally to reject the boat, respondent proposed that it would send two men down who would fix the boat to appellant's satisfaction, and said that this would take only three or four days. Appellant acceded to this proposal with the stipulation that if there was further trouble, he would return the boat. Respondent sent two men, who worked on the boat for several days. It is well to see the state of affairs when appellant came up for the next week-end, appellant having been promised the boat for Sunday. Apart from a number of matters of lesser importance, there were still the following defects uncorrected:

(a) The engine, which was not firmly secured to a proper bed, had tilted to one side. In addition to the instability of the

engine itself there was the further consequence that the steering-gear and the choke were jammed. The workmen had done a "temporary job" to free the controls, but did nothing to secure the engine.

(b) Water was getting into the cylinder-head from some cause that respondent's workmen had not been able to determine. As a result the engine was hard to start and did not run properly. Improper installation of the exhaust may have been the cause, or it may have been the gasket, and it may not have been either.

(c) The steering-gear had been improperly installed, and its movement was not free. This is apart from the trouble caused by the tilting of the engine.

(b) The gasoline tanks were not furnished with drip pans as required by the contract. As the result any drip or overflow of gasoline collected in the bottom of the boat and ran back into the engine compartment. This had been attended to after a manner, but not as the contract required.

(e) The gear-box was noisy and became over-heated, also it was loose, and as a result had got out of alignment. The workmen corrected the alignment for the time being, but the gear-box remained loose. That defect they were unable to correct.

(f) The contract called for "double sound-proof, fire-proof, explosion-proof and water-tight bulk-heads". Certain holes in the bulk-heads were necessary, but these holes were unnecessarily large, and should have been provided with covers. There were no such covers.

Respondent's man Wray, in charge of the work, does not dispute either the existence or the importance of these several defects. Certain of them, such as securing the engine to a proper bed and fixing the loose gear-box, he says it was not within his province to correct. A boat in the condition of this boat at that time is not one that any man would buy for the pleasure of driving it or as a safe boat to leave for his wife to use in his absence.

The learned trial Judge, however, considered it a proper boat to require appellant to accept as in fulfillment of the contract, but subject to an allowance of \$300.00. The very substantial amount of the allowance in itself suggests that there was still much to be done. The hull, the engine, the shaft and propeller, the steering-gear and other parts were doubtless all good enough, but appellant was not buying the parts for a boat. Where respondent's skill, care and experience were especially required

was in the proper installation and putting together of all the component parts of a finished craft that could be operated efficiently and with safety by persons who were not experts. To have a 140-h.p. engine insecure in the boat, or steering-gear that does not respond freely and dependably as required, or gasoline collecting in the engine compartment may, any of them, be dangerous things.

It may be that these and other matters could be put right by skilled workmen. I think respondent had ample opportunity to put them right. Appellant was not bound to continue indefinitely the struggle to have it done. It may be that to put matters right would not have been a simple task. These installations once wrong sometimes persist in staying wrong. The indirect drive, which the contract specified, may have introduced complications that respondent had not successfully solved. In any event the combination of troubles, considered with the delay and the lack of success in removing them, gives rise to a doubt whether the problems of such an installation had yet all been met. In my opinion respondent had no right to unload these troubles upon appellant. I fail to find in the cases cited by the learned trial Judge a warrant for so deciding.

For these reasons I am of the opinion that appellant had the right to reject the boat on the 18th of July, 1938, because it was not in conformity with the contract and did not fulfil the implied condition of fitness for the purpose for which it was required.

HENDERSON J.A.:—An appeal from the judgment of Greene J., dated August 24th, 1939.

The plaintiff contracted to purchase and the defendants to construct and deliver a twenty-five-foot motor boat for the sum of \$4,000.00, and the action is brought for rescission of the contract, and the return of \$2,000.00 paid on account, on the ground that the boat was not reasonably fit for the purpose for which it was sold, and on the further ground that the purpose for which the boat was required was fully explained to the defendant.

The learned trial Judge among other findings found as a fact that the purchaser relied on the vendor's skill, and made known to the vendor the particular purpose for which the boat was desired, namely, for use as an ordinary pleasure boat on certain waters, the general nature of which was known to the vendor.

The learned trial Judge, for reasons and upon authorities with which I agree, finds that the plaintiff had not accepted the boat

within the meaning of sec. 34 of The Sale of Goods Act, R.S.O. 1937, ch. 180.

Mr. Porter, in an admirably presented argument, endeavoured to get rid of this finding against him, and contended that on June 11 the plaintiff accepted the boat, and if he did not then he accepted it on June 18, and if not then he accepted it on July 12. I need not enter into the details of the circumstances and events which occurred on these dates and between these dates, but I am convinced by the evidence and by the argument of Mr. Phelan that nothing that took place on any or all of these occasions constitutes an acceptance, but that, at the instance of the defendant, the plaintiff deferred the exercise of his right of rejection upon representations made to him that the boat would be made satisfactory; and in my opinion this deferring of his right to exercise his right of rejection is in conflict with any idea of acceptance, and further, inasmuch as the defendant failed to perform its undertaking in accordance with the terms arranged on July 12, that the plaintiff was entitled to exercise and properly exercised his right of rejection on July 17.

The learned trial Judge made the further finding that the plaintiff is entitled to the benefit of sec. 15 of The Sale of Goods Act already referred to, and which is as follows:

“Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows, (a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller’s skill or judgment, and the goods are of a description which it is in the course of the seller’s business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose; provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.” With that finding I agree.

The authorities cited by the learned trial Judge support his conclusion, and I agree that the case of *Advance-Rumely v. Lester* (1927), 61 O.L.R. 4 and other cases of the same kind turn upon the fact that the contracts in those cases respectively

excluded conditions as well as warranties. Conditions are not excluded by the contract in the case at bar.

The point at which I am unable, with great respect, to agree with the learned trial Judge, is his finding that the plaintiff is entitled only to damages. In my opinion the defendant failed to deliver the article which the plaintiff bought, and therefore there is a breach of the contract itself and a breach of the implied condition referred to in sec. 15 of The Sale of Goods Act. After breach of the contract there cannot be rescission but the plaintiff is entitled to avoid the contract and recover the moneys he has paid.

For these reasons I would allow the appeal and direct that judgment be entered in the Court below in favour of the plaintiff for \$2,000.00 and the costs of the action.

The plaintiff is also entitled to the costs of the appeal.

GILLANDERS J.A.:—I have had the privilege of reading the judgments of my Lord the Chief Justice and my brother Henderson in this case. I am in agreement with the reasons clearly set out therein and the conclusion reached and there is nothing I can usefully add thereto.

Appeal allowed with costs.

[GREENE J.]

Rex ex rel. Bitzer v. Jaimet.

Municipal Corporations—Public Utilities Commission—Whether member of Commission disqualified because of contract between Commission and a limited company of which member was a shareholder and president—The Municipal Act, R.S.O. 1937, ch. 266, sec. 53—The Public Utilities Act, R.S.O. 1937, ch. 286, sec. 37(4).

Section 53 of The Municipal Act, R.S.O. 1937, ch. 266, provides in part as follows:

"53. (1) The following shall not be eligible to be elected a member of a council or be entitled to sit or vote therein,—

"(o) a person having himself or by or with or through another an interest in any contract with the corporation or with any commission or person acting for the corporation or in any contract for the supply of goods or materials to a contractor for work for which the corporation pays or is liable directly or indirectly to pay, or which is subject to the control or supervision of the council or of an officer of the corporation, or who has an unsatisfied claim for such goods or materials.

"(p) a person who, either himself or by or with or through another has any claim, action or proceeding against the corporation, . . .

"(3) Subsection 1 shall not apply to a person by reason only,—

"(a) of his being a shareholder in an incorporated company having dealings or a contract with the corporation;

.

"(4) A person being such a shareholder shall not vote on any question affecting the company"

By sec. 37(4) of The Public Utilities Act, R.S.O. 1937, ch. 286, the above portions of The Municipal Act are made applicable to Commissioners elected under The Public Utilities Act.

The present proceedings were instituted for an order declaring that the respondent was not entitled to sit as a member of the Public Utilities Commission of the City of Kitchener. It appeared that the respondent had no personal dealings with the Commission, but a limited company of which the respondent was president and principal shareholder had sold certain goods to the Commission.

Held, that the respondent was not disqualified for the following reasons:

(1) The respondent was not disqualified under sec. 53(1)(o) or under sec. 53(1)(p) of the Act, since the Act specifically says that the respondent should not be disqualified by reason only of being a shareholder in a company having dealings with the Commission. The respondent's interest as a shareholder in the limited company did not disqualify him and the fact that he had a further position in the company which had no disqualifying effect was not enough to disqualify him; by adding together two circumstances neither of which taken alone disqualifies, one cannot arrive at a disqualification: *Lapish v. Braithwait*, [1926] A.C. 275, applied.

(2) The minutes of the meetings of the Commission showed that the respondent seconded a motion for the payment of several accounts, including the accounts owing to the limited company of which he was president and principal shareholder, but the minutes did not indicate definitely that the respondent voted on the motion. The minutes showed the word "carried" after the motion and did not indicate any dissenting vote, and therefore it should be held that the vote was unanimous, which would include the respondent as having voted affirmatively. However, a violation of sec. 53(4) of the Act does not entail disqualification.

AN appeal by A. B. Bitzer, relator, from an order of The Master dismissing a motion by the relator for an order declaring that J. C. Jaimet is not entitled to sit as a member of The Public Utilities Commission of the City of Kitchener.

June 21st, 1940. The appeal was heard by GREENE J. in Weekly Court at Toronto.

R. L. Kellock, K.C., and *E. B. Jolliffe*, for A. M. Bitzer, relator, appellant.

G. M. Bray, for J. C. Jaimet, respondent.

July 27th, 1940. GREENE J.:—The respondent Jaimet was elected a member of The Public Utilities Commission of the City of Kitchener on December 4th, 1939.

The appellant contends that he is disqualified under the following sections of The Municipal Act, R.S.O. 1937, ch. 266.

"53(1) The following shall not be eligible to be elected a member of a council or be entitled to sit or vote therein,—

.

"(o) a person having himself or by or with or through another an interest in any contract with the corporation or with

any commission or person acting for the corporation or in any contract for the supply of goods or materials to a contractor for work for which the corporation pays or is liable directly or indirectly to pay, or which is subject to the control or supervision of the council or of an officer of the corporation, or who has an unsatisfied claim for such goods or materials.

“ (p) a person who, either himself or by or with or through another has any claim, action or proceeding against the corporation

“(3) Subsection 1 shall not apply to a person by reason only,—

“(a) of his being a shareholder in an incorporated company having dealings or a contract with the corporation:

“(4) A person being such a shareholder shall not vote on any question affecting the company or being such a lessee shall not vote on any question affecting his lease or his rights or liabilities thereunder, or being so exempt from taxation shall not vote on any question affecting the property so exempt, or being such a proprietor of or otherwise interested in a newspaper or other periodical publication shall not vote on any question affecting his dealings with the corporation.”

By sec. 37(4) of The Public Utilities Act, R.S.O. 1937, ch. 286, the above portions of The Municipal Act are made applicable to the commissioners elected under The Public Utilities Act.

On the facts as found by the learned Master the respondent had no personal dealing with the Commission, but J. C. Jaimet and Company Limited had, being a joint stock company of which the respondent was president and principal shareholder. On the 30th of December, 1939, the Commission owed to the above company \$30.86 and a further amount as of the 29th February, 1940, of \$29.43. The Master finds, “All the articles were purchased by a member or members of the staff of the Kitchener Public Utilities Commission from the store operated by the Jaimet Company from time to time as required without the previous knowledge of the respondent, without any contact between the respondent and the person or persons making the purchase, and at regular retail prices.”

If the respondent was personally the owner of the Jaimet business he would undoubtedly be disqualified under both 53 (1) (o) and 53(1) (p).

The Act specifically says he is not disqualified by reason "only" of being a shareholder in a company having dealings with the Commission. Practically identical legislation was considered by the House of Lords in *Lapish and Braithwait*, [1926] A.C. 275, the word "only" carrying the same significance. The wording of the English Act is:

"But a person shall not be so disqualified, or be deemed to have any share or interest in such a contract . . . by reason only of his having any share . . . in . . . any company."

The proceeding was against an alderman who was a shareholder in and managing director of a company having current contracts with the council to which he had been elected. In the judgment Viscount Cave L.C., held that a managing director paid by fixed salary and not by a percentage did not come within the words "has directly or indirectly, by himself or his partner, any share or interest in any contract." In the judgment of first instance Bailhache J., who held the alderman disqualified dealt with the word "only" as follows:

"Surely the very object of the word 'only' is to distinguish between a person who is merely a shareholder and a person who in addition to being a shareholder, is something else in the company. What can a man be more in the company than managing director? I myself see no use in the words 'only a shareholder' if a managing director is also exempt."

In dealing with the above the Lord Chancellor said:

"With the greatest respect for the opinion of that very learned Judge, I am unable to agree with this reasoning. The subsection does not say that if a man is a shareholder in a company and nothing more he shall not be disqualified, but that he shall not be disqualified by reason only of his being a shareholder. His interest as a shareholder does not disqualify him, and the circumstance that he adds to his position as a shareholder some other position which also has no disqualifying effect is not enough. It cannot be that by adding together two circumstances, neither of which taken alone disqualifies, you can arrive at a disqualification."

Counsel for the appellant stressed certain remarks of the Lord Chancellor at the end of the report in the above case, which

suggest that the force of the legislation might be defeated by means of a company controlled by a member of a municipal body. Coupled with this is a suggestion "that the Legislature might well consider whether this section should not be strengthened either by extending the disqualification to persons who hold a substantial proportion of the shares in a contracting company or in some other way." The remarks are purely dicta, but they seem to me to indicate that in the opinion of the Lord Chancellor the legislation did not affect a substantial shareholder any more than a small holder.

In my opinion the respondent is not disqualified under 53(1) (o) or 53(1) (p).

The relator further relies on sec. 53(4) which says that such a shareholder shall not vote on any question affecting the company. The learned Master has found that there was no evidence before him that the respondent did vote on any of the motions for payment. The material does show that the respondent seconded a motion for payment of the accounts for December (in which was included the account in question), but the minutes do not indicate definitely that the respondent voted. The minutes show the word "carried" after the motion and do not indicate any dissenting vote.

Under such circumstances it seems to me that following *R. ex rel. Helman v. Murray* (1864), 1 C.L.J. (N.S.) 104 and *Mallough v. Ashfield* (1856), 6 U.C.C.P. 158, it should be held that the vote was unanimous, which would of course include respondent as voting affirmatively. However, it is not necessary to decide that point as such a vote would not entail, in my opinion, disqualification. The statute does not say so, and it would only be proper to apply such a penalty where the statute provides it in the clearest of language. In many cases of this kind it has been laid down very strongly that the representative elected by the voters must not be ousted from his position unless the legislation clearly says so in relation to the facts involved.

The appeal fails and must be dismissed with costs payable to the respondent by the relator.

Appeal dismissed with costs.

[COURT OF APPEAL.]

Crown Construction Company et al. v. Cash et al.

Mechanics' Liens—Leases—Allegation that landlord had wrongfully put an end to tenant's lease to which appellants' liens had attached—Contention that lien claimants entitled to damages—No claim for damages on record—Whether such claim could be asserted in proceedings under The Mechanics' Lien Act, R.S.O. 1937, ch. 200.

On an appeal from the judgment of an Assistant Master in a mechanics' lien action it was contended on behalf of the lien claimants that they were entitled to damages against the owner of the lands in question on the ground that the owner had wrongfully put an end to the interest of a tenant under a lease to which the claimants' liens had attached.

Held, that since no such claim on behalf of the lien claimants appeared on the record and since there was no reference to it either in the formal judgment or in the reasons for judgment of the Assistant Master, such a claim could not be asserted in the Court of Appeal.

Semble, moreover, that the lien claimants could not bring an action under The Mechanics' Lien Act, not to enforce the lien, but to recover damages for the wrongful destruction of the interest upon which the lien attached; the lien claimants cannot both approbate and reprobate, that is, maintain their liens as valid and effective and at the same time recover in tort on the ground their liens were destroyed by the owner of the land.

AN appeal by the defendants Fannie Gertzbein and Marie Rosefield, executrices of the will of Cyril Goldhar, deceased, from parts of the judgment of A. T. Hunter, Esq., Assistant Master, in a mechanics' lien action.

September 10th and 11th, 1940. The appeal was heard by ROBERTSON C.J.O., MIDDLETON and MASTEN JJ.A.

I. F. Hellmuth, K.C., and *S. J. Birnbaum*, for the appellants.

R. L. Kellock, K.C., and *M. Goodfellow*, for the Crown Construction Co., respondent.

J. Newman, for Ben Katz, respondent.

September 26th, 1940. ROBERTSON C.J.O.:—An appeal by the defendants Fannie Gertzbein and Marie Rosefield, executrices of Cyril Goldhar, from the judgment in a mechanics' lien action pronounced by A. T. Hunter, an Assistant Master, on the 20th April, 1940. The appeal is from only such parts of the judgment as affect these executrices.

The case is an unusual one and the facts are complicated. It is important to maintain unobscured the rights and remedies which The Mechanics' Lien Act provides for the persons it is intended to protect, and it is therefore desirable that it should clearly appear that there is no impairment of them involved in this judgment. For that purpose a somewhat detailed statement of the case is necessary.

The material facts are as follows. The appellants are the owners, subject to mortgage, of the freehold of a parcel of land on the west side of Markham Street in the City of Toronto, on which there is erected a moving picture theatre. On 11th May, 1938, the applicants leased this property to John J. Winnick and the defendant Cash. The lease was for a term of fifteen years, subject, however, to a provision whereby the term of the lease should end on the 10th February, 1946, unless the lessees made, at their own expense, certain substantial improvements, to be undertaken on or before 15th July, 1939, and completed on or before 30th September, 1939.

Winnick, who was a lessee with Cash, retired from the enterprise early in 1939, and Cash carried on the theatre business alone. In July, 1939, Cash informed the appellants of his intention to make the improvements mentioned in the lease, and shortly thereafter he proceeded to do so. The liens claimed by the respondents arise in connection with these improvements, the contract between Cash and the respondent, Crown Construction Co., being dated 3rd August, 1939.

Cash was soon in financial difficulties. Early in September, 1939, his rent, payable monthly in advance, became in arrear and thereafter he paid no rent. On October 20th, 1939, the plaintiff Katz registered a claim for lien for \$150.00; on October 25th Canadian Theatre Chair Co. issued a warrant to their bailiff to re-take possession of certain chairs and lights delivered to Cash at the theatre, under the terms of a conditional sales contract dated August 28th, 1939, default having been made in payment of the purchase price; on October 28th the plaintiff Crown Construction Co. registered its claim for lien for \$2,550.00; on October 30th the appellants, through their bailiffs, served Cash with a notice pursuant to sec. 33 of The Landlord and Tenant Act, that unless the sum of \$875.00, rent in arrear, was paid they demanded immediate possession of the premises, and were ready to leave in his possession such of his goods and chattels as he was entitled to claim exemption for, and that if he neither paid the rent nor gave up possession of the premises within three days after service of the notice, they were entitled to seize and sell and intended to seize and sell all his goods and chattels, or such part thereof as might be necessary for the payment of the rent and costs.

It would appear that Cash was heavily involved; he had liabilities in respect of the theatre alone aggregating nearly \$9,000.00 and the evidence indicates that he had other creditors. In these circumstances Cash prevailed upon the appellants to extend the time for payment of his rent until Saturday, November 4th, he having certain negotiations pending for the sale of his lease. On the evening of November 4th, no rent having been paid, Cash was permitted to remove from the theatre some clothing and other articles which he claimed were exempt from seizure, and handed the key of the theatre to appellants' bailiff. Whether this was intended at the time by Cash as a surrender of possession pursuant to the notice given him may be matter for dispute. It may be that Cash did not so intend it. If he did, he must soon have changed his mind, for on Monday, November 6th, he entered into a formal agreement with one Sandler for the assignment of his lease to Sandler on terms that, provided they had been carried out by both parties, would have provided for the rent in arrear and for respondents' liens as well. Cash was in a difficult position and was much harassed by many pressing claims, and it is not surprising if he did not always pursue a consistent course. The evidence is conflicting and somewhat confusing as to what occurred at this time and in the course of the next two or three days. There are also questions as to what knowledge the appellants had of the dealings of Cash with Sandler, questions as to what (if any) promises were made to further extend time, and other questions, none of which, in my opinion, it is necessary to determine on this appeal. Respondents allege that what occurred gave rise to a cause of action on the part of the lien-holders against the appellants, but, as will hereafter appear, in my opinion no such cause of action is involved here. Whatever may be the merits of the respective contentions in relation to his transactions with Sandler, Cash paid no more rent, nor did anyone pay it for him. A member of the Crown Construction Co. says that he expressed an intention on the part of his Company to pay the arrears of rent, but no payment was made or tendered, and on November 9th appellants made a new lease of the premises to Sandler, to whom on November 6th Cash had agreed to assign his lease. Cash admits that he went no further with his agreement to assign, and it is doubtful whether he could have complied with its terms, particularly in satisfying the requirements

of The Bulk Sales Act. Sandler went into possession under his lease and has expended a substantial sum upon the property.

The situation from and after November 9th therefore was that Cash had lost his lease and Sandler was in possession of the premises in question under a new lease direct to him from the appellants, the owners of the fee simple. The terms of that lease were substantially different from the terms of the lease that Cash had held and that, on the 6th November, he had agreed to assign to Sandler. The new lease was for a different term. There was no provision requiring the lessee to make improvements or, as an alternative, to submit to having the term of the lease cut down. The terms as to payment of rent were different, and there are other substantial differences between Sandler's lease and the lease to Cash.

The facts I have set forth are important in considering the judgment appealed from and the arguments presented.

The action of Crown Construction Co. was commenced on 16th November, 1939, after the events I have referred to, by the filing of a statement of claim under the provisions of The Mechanics' Lien Act. The form of action and the relief claimed are important. The statement of claim alleges that the appellants were the owners of the lands in question, and that Cash was a lessee; that Cash had entered into an agreement with the plaintiff to make certain alterations to the buildings on the lands for the sum of \$5,350.00; that the plaintiff had performed the work and supplied the material and had received \$2,800.00 on account of its claim, and that there was due it the balance of \$2,550.00, for which it alleged it is entitled to a lien upon the estate and interest of the defendant in the lands. A copy of the lien is set forth in the statement of claim, from which it appears that the claim of lien registered is upon the estate of the appellants as well as upon the interest of Cash. The assignment of lease made on 22nd June, 1938, by which Winnick retired from the theatre business, and which, apparently, was in the form of an assignment to Winnick and Cash as trustees, is then alleged. There follows this paragraph, which contains the only further allegations made in the statement of claim:

"8. The plaintiff alleges that the defendants, Fannie Gertzbein and Marie Rosefield, have wrongfully and fraudulently refused to disclose the terms of the lease referred to in the assignment of lease aforementioned. Further, that the said defendants

have wrongfully and illegally taken possession of the lands and premises aforementioned, and have fraudulently prevented the plaintiff from exercising its rights to the leasehold interest of the defendant Harry Cash, in the lands and premises aforementioned, as provided for under 'The Mechanics' Lien Act.'"

The prayer which follows this paragraph is for payment by the defendants of \$2,550.00 and interest and costs; that the plaintiff be entitled to judgment against the defendants in that sum and costs, and the claim and costs of all other lien-holders, pursuant to 'The Mechanics' Lien Act, and for these purposes that all proper directions be given and accounts taken; an order on default of payment that the estate and interest of the defendants in the lands and buildings, or a competent part thereof, may be sold and the proceeds applied towards payment of the plaintiff's debt and costs pursuant to 'The Mechanics' Lien Act; that for the purposes aforesaid all proper directions and orders be given and accounts taken, and finally such further and other relief as may seem meet.

It is upon this statement of claim that the matter proceeded to trial before the learned Assistant Master. The Katz action was consolidated with the action of the Crown Construction Co., counsel for Katz stating that he had commenced his action not knowing of the action of Crown Construction Co., and that he stood just in the position of a lien-holder if he proved a lien. Sandler, appellant's new lessee, who was in possession, was not made a party, although he was called as a witness at the trial.

By the judgment appealed from the learned Assistant Master declared that the plaintiffs, Crown Construction Co. and Katz, were respectively entitled to a lien under 'The Mechanics' Lien Act upon all the estate, right, title and interest of the defendant Harry Cash, in the lands in question under the lease of 11th May, 1938, from the appellants to Cash and Winnick, and Cash was declared to be the person primarily liable for the plaintiffs' claims. The learned Assistant Master next declared that there was no forfeiture of the above-mentioned lease as against the lien-holders, and that the appellants fraudulently entered into a device to defeat the priority of the lien-holders. It was then ordered that upon Cash or the appellants, or either of them, paying into Court the amount of the liens on or before 8th May, 1940, the liens be discharged and the money be paid out to the lien-holders. In default of such payment it was ordered

that the estate, right, title and interest of Cash in the lands in question be sold and the purchase money paid into Court and be applied towards payment of the claims of the lien-holders. Finally, the Assistant Master ordered that in case the purchase money should be insufficient to pay in full the claims of the lien-holders, Cash (whom he had found to be the person primarily liable for these claims) and the appellants "do pay to the persons to whom they are respectively liable the amount remaining due to such persons forthwith after the same shall have been ascertained by the said Master." In view of the fact that the Assistant Master had not found either that the appellants were persons primarily liable, or that their estate in the lands was subject to the liens, it is somewhat difficult to understand what he meant by this direction for payment—"to the persons to whom they are respectively liable."

The appellants contend that there is no liability on their part to pay the lien-holders anything. They also object to the declarations that there was no forfeiture of the lease held by Cash and that the appellants fraudulently entered into a device to defeat the priority of the lien-holders.

It seems to be quite clear that the lien-holders could not support a claim for payment by the appellants on the ground that they are "owners" within the meaning of sec. 5 of The Mechanics' Lien Act (*Stuart & Sinclair Ltd. v. Biltmore Park Estates Ltd.*, [1931] O.R. 315), nor can the respondents claim the benefit of subsec. 1 of sec. 7 of The Mechanics' Lien Act, as admittedly, no notice in writing was given as required by that subsection. Counsel for respondents in fact did not attempt before this Court to support their judgment for payment by the appellants on any such grounds. His contention was that the appellants had wrongfully put an end to the Cash lease to which the appellants' liens had attached, thereby depriving the respondents of any benefit from their liens, and that what the appellants were ordered to pay was damages for their wrongful act in extinguishing the lease, and that the amount to be paid as damages was the full amount of the liens, as nothing could be realized under them.

It is not necessary, nor have we the right on this appeal, to decide whether the lien-holders have any such claim for damages against the appellants. No such claim appears on the record, and there is no reference to it either in the formal

judgment, or in the reasons for judgment of the learned Assistant Master. In my opinion it is more than doubtful whether the respondents, who say that they have been wrongfully deprived of liens that they were entitled to, can bring an action under The Mechanics' Lien Act, not to enforce a lien, but to recover damages for the wrongful destruction of the interest upon which the lien attached.

It is not open to argument that the Assistant Master did not adjudicate upon any such claim for damages as respondents' counsel now puts forward. The Assistant Master did not find that respondents' lien, or the Cash lease upon which it attached, had been put an end to. He found the very opposite. He held that the Cash lease and the liens upon it still exist. In his reasons for judgment he says that "so far as concerns this claim I treat the new lease as, in effect, an assignment of the old lease, and subject to the lien and claim of the plaintiffs." I have difficulty in following the learned Assistant Master to this conclusion, but there cannot be the slightest doubt that the judgment of the Assistant Master is based upon his view that the Cash lease is still in existence, for he declares the plaintiffs entitled to a lien on the estate, right, title and interest of Cash in the lands under the lease from the appellants to Cash and Winnick, dated 11th May, 1938. It is this estate, right, title and interest that he directs to be sold for the satisfaction of the plaintiffs' liens. It may seem a difficult matter to support the view of the Assistant Master that Cash still retains any estate, right, title or interest in the lands, and that Sandler—who, although in possession under his own lease, is not even a party to the proceedings—may be completely ignored. However, that is the Assistant Master's judgment, and it is not conceivable that by the same judgment he had proceeded to award damages to the plaintiffs on the basis that they have been wrongfully deprived of their liens by the determination of Cash's lease. In truth, the Assistant Master had not before him, nor did he assume to try and determine, any such claim for damages as is now set up on behalf of the respondents to support the judgment for payment by the appellants. There was no inquiry of that kind before the Assistant Master. It is impossible, therefore, to give effect to the argument of counsel for the respondents in support of that part of the judgment that directs payment by

the appellants of any sum owing in respect of the liens, and the judgment in that respect must be set aside.

With respect to the declarations contained in the judgment that there was no forfeiture of the Cash lease as against the lien-holders, and that appellants fraudulently entered into a device to defeat the priority of the lien-holders, no such declarations are asked in the statement of claim, and in the absence of Sandler, the new lessee, it is difficult to see how any such declarations can be made or how effect can be given to them in this action. In any event appellants do not rest the determination of the Cash lease on any forfeiture for non-payment of rent, which the Assistant Master finds improper, but upon the provisions of sec. 33 of The Landlord and Tenant Act. What the result of the occurrences on or about November 4th, 1939, when Cash ceased to be in possession and Sandler acquired a lease, was, may be left for determination in some proceeding when all necessary parties are before the Court, and some appropriate relief is asked. These declarations should be stricken out of this judgment.

The appeal is therefore allowed with costs, and the action as against appellants is dismissed with costs.

MASTEN J.A.:—This is an appeal by the appellants above-named against so much of the judgment of A. T. Hunter, Esquire, one of the Assistant Masters of this Court, dated the 20th April, 1940, as imposes liability on the said appellants.

The action is by the Crown Construction Company for the enforcement of a lien registered on the 27th October, 1939. Ben Katz is another lien-holder whose lien has been held effective.

The principal lien reads as follows:

“Crown Construction Co’y of the City of Toronto, in the County of York, under ‘The Mechanics’ Lien Act’ claims a Lien upon the Estate of Fannie Gertzbein and Marie Rosefield Executrices of Cyril Goldhar

Harry Cash

of the City of Toronto, in the County of York, in the under-mentioned land in respect of the following labour or materials; that is to say; Alteration & Addition, General Contract which labour or materials were furnished for Harry Cash on or before the October 6th, 1939.

"The amount claimed as due is \$2,550.00 and \$75.00 for this Lien. The following is a description of the land to be charged: All and singular in City of Toronto and being Part of lot 94 on west side of Markham St. according to Plan filed in Registry Office for Registry Division of Toronto as No. 74 as described in 68576 WB. Dated the 27th day of October, 1939."

By paragraph 1 of the judgment, both liens are declared effective upon all the estate, right, title and interest of the defendant Harry Cash in the lands in question, under the lease to the said Harry Cash and others, and declaring the said Harry Cash primarily liable for the claims of the lien-holders.

The second paragraph of the judgment declares that there was no forfeiture of the lease to Harry Cash as against the lien-holders.

Paragraph 3 is as follows:

"3. And this Court doth further declare that Fannie Gertzbein and Marie Rosefield, Executrices of the Estate of Cyril Goldhar, Defendants herein, fraudulently entered into a device to defeat the priority of the lien-holders herein."

Paragraphs 4, 5 and 6 make the usual provisions as to redemption of the lien and as to enforcement of it in case it is not redeemed; and paragraph 7 of the judgment is as follows:

"7. And this Court doth further order and adjudge that in case the said purchase money shall be insufficient to pay in full the claims of the several persons mentioned in the First Schedule, the persons primarily liable for such claims as shown in the said First Schedule, and Fannie Gertzbein and Marie Rosefield, Executrices of the estate of Cyril Goldhar, do pay to the persons to whom they are respectively liable the amount remaining due to such persons forthwith after the same shall have been ascertained by the said Master."

The defendant Cash does not appeal, nor does the trustee of his estate do so. One Sandler, who is referred to in the evidence and who is thereby shewn to be now in possession under a lease, has not been made a party to these proceedings.

The only questions before this Court on the present appeal relate to the liability of the appellants as executrices of the estate of Cyril Goldhar, owners of the freehold in the lands in question, and that liability is referred to in the judgment now in appeal in paragraphs 3 and 7 as quoted above. So much of the lien-holders' judgment as declares the validity of their

liens as against the leasehold interest of the defendant Cash, and his primary liability to the plaintiffs, remains unattacked, and in full force so far as this appeal is concerned.

On the argument before us counsel for the respondents contended that the appellants had no right in law to execute a new lease, and to deprive the plaintiff of its statutory interest in the lease to Cash, as well as of its right to pay the arrears of rent and sell the leasehold interest of Cash, and that by so doing the landlords had deprived the plaintiff of its interest in the former lease to Cash, and caused damage to the lien-holders for which they are liable to the plaintiff; and it was further contended that, as the learned Master had found, the transaction in question was a fraudulent scheme between the defendant landlords and one Sandler to deprive the plaintiff of its lien.

Both of these claims are based on the foundation that the respondents' lien has been destroyed, while at the same time the judgment declaring the plaintiffs' liens effective and valid and providing for their enforcement, is maintained.

The respondents are therefore in the position of seeking both to enforce their lien as a valid lien, and at the same time to recover against the appellants on the ground that, by the wrongful action of appellants, their liens have been destroyed. In my opinion they cannot both approbate and reprobate, that is, maintain their liens as valid and effective and at the same time recover in tort because they have been destroyed by the appellants.

Further, I agree with the appellants' contention that no notice was given to the appellants under the provisions of sec. 7(1) of The Mechanics' Lien Act, and that consequently no primary liability attaches to the appellants.

The result is that in my view the appeal should be allowed and the appellants should be dismissed out of the action, with costs here and below payable by the respondents.

MIDDLETON J.A. agreed with ROBERTSON C.J.O. and MASTEN J.A.

Appeal allowed with costs.

[GREENE J.]

Green v. Livermore et al.

Green v. Brickenden et al.

False imprisonment—Conspiracy—Negligence—Powers of magistrate under sec. 35 of The Mental Hospitals Act, R.S.O. 1937, ch. 392—Constitutional validity of sec. 35 of the Act—Limitation of actions—Limitation period prescribed by sec. 10(2) of the Act.

By sec. 35(1) of The Mental Hospitals Act, R.S.O. 1937, ch. 392, it is provided that "any person may be admitted to an institution upon the order of a Judge or Magistrate where such person has been apprehended either with or without warrant and charged with any offence, provided that such order is accompanied by the prescribed history form, and provided also that such order shall be for a period not exceeding sixty days, and any order made under this section shall direct that such person shall be conveyed to the institution most conveniently situated to the place where the order is made."

Held (a) that sec. 35 of the Act is *intra vires* of the Legislature of the Province of Ontario and is not an infringement of the power of the Dominion Parliament to enact legislation with reference to the criminal law. The action of a Judge or Magistrate in sending a person to a mental hospital under sec. 35 of the Act does not arise from any crime of that person; it is a step in the control of persons who have always been dealt with by the Province in legislation of the nature of The Mental Hospitals Act.

(b) The contention that the section is contrary to natural justice does not mean anything in view of the fact that the Legislature of Ontario has within its own field powers as plenary as those of the Imperial Parliament which created it. Sec. 35 of the Act may seem to some to put a dangerous power in the hands of a magistrate or Judge, but within its field that is a matter for the Legislature and not for the Courts.

(c) The word "admitted" in sec. 35 means the same as "committed", and under sec. 35 a magistrate has the power to commit a person to an institution for examination.

ACTIONS for damages for false imprisonment, conspiracy and negligence.

April 8th, 9th, 10th, 11th, 16th, 17th, 18th, 19th and 20th, 1940. The actions were tried together by GREENE J., without a jury, at Toronto.

John R. Green, the plaintiff, in person.

R. L. Kellock, K.C., for the defendants Livermore, Haines and Stevenson.

F. J. Hughes, K.C., for the defendant Duncan.

W. R. West, for the defendant Wharton.

C. P. Hope, K.C., for the defendant The Public Trustee.

N. F. Newton, K.C., for the defendants Brickenden and Ferguson.

October 3rd, 1940. GREENE J.:—The actions were tried together and both arise out of the circumstances attendant upon

the confinement of the plaintiff as an involuntary patient in The Ontario Hospital at London, Ontario, from November, 1935 to August, 1938.

The defendant Livermore is a magistrate upon whose order the plaintiff was admitted to the hospital pursuant to sec. 35 of The Mental Hospitals Act, R.S.O. 1937, ch. 382 (then sec. 36, ch. 39 Statutes of Ontario 1935). The section may be conveniently set forth now:

“(1) Any person may be admitted to an institution upon the order of a judge or magistrate where such person has been apprehended either with or without warrant and charged with any offence, provided that such order is accompanied by the prescribed history form, and provided also that such order shall be for a period not exceeding sixty days, and any order made under this section shall direct that such person shall be conveyed to the institution most conveniently situated to the place where the order is made.

“(2) Before the expiration of the time contained in the order of the judge or magistrate mentioned in subsection 1, the superintendent shall report in writing the mental condition of such person to the judge or magistrate.

“(3) Where in the opinion of such superintendent such person is mentally ill or mentally defective, he shall direct the examination of such person as provided for by section 24, and if the examining medical practitioners certify such patient to be mentally ill or defective, he shall be detained as a certificated patient and shall be subject to all the provisions of this Act and of the regulations respecting certificated patients.

“(4) Where in the opinion of the superintendent such patient is neither mentally ill or mentally defective and where the superintendent has failed to obtain certificates in the prescribed form he shall discharge such person to the custody of the court by which he was ordered to the institution.”

The defendant Haines is the County Crown Attorney, who appeared for the Crown when the plaintiff was brought before Magistrate Livermore, upon an information charging him with having committed an offence against The Liquor Control Act, Ontario. The defendant Stevenson was the superintendent of the hospital at the time of Green's admission and until after his discharge. The defendants Duncan and Wharton are medical practitioners who certified the plaintiff to be mentally ill after

examinations made pursuant to the provisions of subsec. 3 of sec. 35. The Public Trustee is made a defendant by reason of his alleged failure to perform his duties as committee of the estate of the plaintiff Green while a patient. Section 72 of The Mental Hospitals Act provides that the Public Trustee shall *ex officio* be the committee of the estate of every patient admitted to an institution until he is discharged therefrom.

The defendants Brickenden and Ferguson and the firm of Brickenden & Ferguson are alleged by the plaintiff to have been retained by him as his solicitors to take proceedings for his release by way of *habeas corpus*.

Upon motion heard September 14th, 1939, Kelly J., save as to the claim for an account, dismissed the action as against the Public Trustee without costs. The plaintiff did not establish at the trial that the Public Trustee had received any assets whatever, and consequently the action against him fails completely on this ground apart from other defences.

I find on the evidence that the defendant Brickenden had no dealings whatsoever with the plaintiff and that no partnership existed at any relevant time between the defendants Brickenden and Ferguson. Consequently there was not at the time the action was commenced any such firm as Brickenden & Ferguson.

The defendant Ferguson, acting on behalf of Green, did obtain the issue of a writ of *habeas corpus* and pursuant thereto the plaintiff was produced before a High Court Judge at London on November 28th, 1935. The hearing was adjourned and after due notice to Green, Ferguson withdrew from the proceedings. According to the evidence of Ferguson he became convinced during the proceedings of November 28th, that Green was not mentally fit to instruct counsel. In my opinion Ferguson had reasonable cause for so believing. Ferguson received no fee or payment of any kind, was not secured in any way as to payment for professional services, and paid out of his own pocket disbursements in connection with the writ of *habeas corpus*. He was quite justified in withdrawing when he did.

The pleadings contain numerous allegations against the various defendants of conspiring to injure the plaintiff, by depriving him of his liberty, by damaging his professional reputation and by causing him financial loss; also various charges of negligence and tortious conduct were made against several of the defendants. No evidence was adduced at the trial which

I could accept, which indicated any conspiracy against the plaintiff; nor was negligent or wrongful conduct proven against any defendant. I accept the evidence of all the defendants as a correct version as to what actually took place and as to the motives actuating the various defendants.

Apart from any question of malfeasance within their powers the plaintiff contends,

(a) that all defendants acting under sec. 35 of The Mental Hospitals Act were liable to him for false imprisonment, as sec. 35 is *ultra vires* the Legislature of the Province of Ontario, and

(b) that, even if sec. 35 be *intra vires*, it does not authorize the procedure followed by the magistrate and the superintendent of the hospital.

Section 35 is said to be *ultra vires* because it is an infringement of the Dominion field of criminal law, and also as contrary to natural justice.

It does not seem to me that either argument is sound. The action of the magistrate in sending the plaintiff to the hospital does not arise from any crime of the plaintiff. It is a step in the control of persons who have always been dealt with by the Province in legislation of the nature of The Mental Hospitals Act.

The argument that the section is contrary to natural justice does not mean anything in view of the fact the Legislature of the Province within its own field has powers as plenary as those of the Imperial Parliament which created it: see *Smith v. City of London* (1909), 20 O.L.R. 133, and *Beach v. Hydro Electric Power Commission of Ontario* (1925), 57 O.L.R. 603 and [1927] S.C.R. 251. Section 35 may seem to some to put a dangerous power in the hands of a magistrate, but within its field that is a matter for the Legislature and not the Courts.

I turn now to the argument that the section does not authorize an order by a magistrate committing a person to an institution for examination. In recent years there has been a great change in the nomenclature used in legislation of this kind. The words "insane" and "lunatic" have been replaced by such phrases as "mentally ill" and "incompetent." The term "commit" has been practically superseded by the term "admit." It seems to me that the word "admitted" in the first line of sec. 35 is used with the same meaning as "committed." That the magistrate is intended to have such power under sec. 35 is

indicated by certain other portions of Part IV of the Act which would be almost meaningless if he did not have such power.

"Section 18 . . . any person who is mentally ill or mentally defective may be admitted to an institution as a,—

(a) . . .

(b) . . .

(c) . . .

(d) patient remanded by a judge or a magistrate in accordance with the provisions of this Act and the regulations."

See also part of sec. 28 covering the case where a magistrate is conducting an inquiry under sec. 25 after an information has been laid that a person is mentally ill.

"28(2) If both the medical practitioners making the examination do not agree, or if the magistrate is not satisfied that such person is mentally ill or mentally defective, the magistrate shall forthwith discharge him, or order such further examination as he shall deem expedient, or may remand him to an institution for a period not exceeding sixty days, in which case the provisions of subsecs. 2, 3 and 4 of sec. 35 shall apply *mutatis mutandis*."

Upon a consideration of subsec. 1 of sec. 35 and the above subsec. 2 of sec. 28 it would appear that the words, "Any person may be admitted to an institution upon the order of a judge or magistrate . . . for a period not exceeding sixty days," in sec. 35 have substantially the same meaning as the words "may remand him to an institution for a period not exceeding sixty days" in sec. 28.

As long as sec. 35 is *intra vires* there can be no question about the effect of sec. 10 of the Act.

"10(1) No action, prosecution or other proceeding shall be brought or be instituted against any officer, clerk, servant, or employee of the Department, or the Public Trustee, or against any other person for an act done in pursuance or execution or intended execution of any duty or authority under this Act or the regulations, or in respect of any alleged neglect or default in the execution of any such duty or authority, without the consent of the Attorney-General.

"(2) All actions and prosecutions against any person for anything done or omitted to be done in pursuance of this Act shall be commenced within six months after the act or omission complained of has been committed, and not afterwards.

“(3) . . .”

The consent of the Attorney-General was not obtained and consequently the action must fail on that ground against all defendants except Brickenden and Ferguson.

The six months' limitation in sec. 10(2) on bringing the action raises further difficulties for the plaintiff with regard to Livermore, Haines, Duncan and Wharton. Nothing was done by any of them within six months prior to the issue of the writ on February 28th, 1939. If the plaintiff was under disability by reason of being mentally ill then the statute would not run against him until recovered, but if he was mentally ill he can have no complaint against these defendants. If he was not mentally ill, as he contends, then he was not under disability and the statute would commence to run against him at the latest from the time he was allowed to live in approved boarding houses and to move about London without any serious restriction. There was nothing then to prevent him retaining counsel if mentally fit to instruct one.

In my opinion both actions fail against all defendants and must be dismissed with costs.

Actions dismissed with costs.

[COURT OF APPEAL.]

Re Woodward.

Ex parte Totten.

Bankruptcy—Powers of Registrar—Appointment of new trustee—Death of prior trustee—The Bankruptcy Act, R.S.C. 1927, ch. 11, secs. 37(2) and 159.

By sec. 37(2) of The Bankruptcy Act, R.S.C. 1927, ch. 11, it is provided that the creditors of a debtor may, by ordinary resolution at any meeting, and the Court may, for cause, appoint a new trustee and remove a trustee who is in office.

By sec. 159 of The Bankruptcy Act it is provided by clause (f) that the Registrar may "make any order or exercise any jurisdiction which by any rule in that behalf is prescribed as proper to be made or exercised in Chambers" and by clause (g) the Registrar may "hear and determine any unopposed or *ex parte* applications."

Held (1) Even though there is only one creditor he can hold a meeting within the meaning of sec. 37(2) of the Act and appoint a new trustee.

(2) The Registrar in Bankruptcy has no power to appoint a new trustee under the above sections. The power of the Court to appoint a new trustee for cause can be exercised only by a Judge.

AN appeal by the executors of the will of John Henry Clarence Woodward, deceased, from an order of Urquhart J. confirming the appointment by the Registrar in Bankruptcy of K. W. Totten as trustee in bankruptcy of the estate of the said John Henry Clarence Woodward, debtor.

October 21st, 1940. The appeal was heard by RIDDELL, FISHER and HENDERSON JJ.A.,

Lewis Duncan, K.C., for the executors of the will of J. H. C. Woodward, deceased, appellants.

A. I. Hodgins, K.C., for K. W. Totten, respondent.

October 30th, 1940. RIDDELL J.A.:—This appeal from the judgment of Urquhart J. involves in reality only the one question, *i.e.*, has the Registrar in Bankruptcy the power to appoint a new trustee on the death of him originally appointed.

The debtor Woodward (now deceased) had one creditor only, one Wild. On Woodward making an assignment in bankruptcy one Houghtby was appointed trustee, and Wild became inspector. Houghtby dying, Wild applied to the Registrar to appoint a new trustee, and the Registrar, purporting to act under sec. 37(2) of The Bankruptcy Act, R.S.C. 1927, ch. 11, appointed Totten, May 12th, 1938. The motion before Urquhart J. was substantially to confirm this appointment. This application succeeded and the appeal is from this confirmation.

Section 37(2) reads: "The creditors may, by ordinary resolution, at any meeting, and the Court may for cause appoint a new trustee and remove a trustee who is in office."

It seems to have been thought that there being only one creditor, there could not be a "meeting" so that a new trustee could be at it appointed, but this is authoritatively met by the case of *East v. Bennett*, [1911] 1 Ch. 163. It is, however, contended that the power given by the subsection quoted gives the Registrar the power there expressly given to the Court. I can find no authority for this contention, and, therefore, I think that the so-called appointment of Totten was a mere nullity, and incapable of being ratified by any authority short of the Legislature.

I would, therefore, allow the appeal with costs here and below.

FISHER J.A.:—The debtor J. H. C. Woodward made an authorized assignment on February 13th, 1933. There was and is only one unsecured creditor by the name of Wild. At a meeting of creditors C. A. Houghtby was appointed trustee and Wild inspector. At that time there was a small estate only to be administered, and the trustee realized about \$250.00. It appears that in May, 1934, the debtor, he then being an undischarged bankrupt, insured his life, the policy being made payable to his estate. The debtor died in February, 1940, and the proceeds of the policy amounted to about \$2,440.00. The debtor made a will in October, 1931, and subject to the payment of all his debts, funeral and testamentary expenses he gave his entire estate to David and Florence Thomas. The estate was valued at about \$4,000.00.

Wild as the sole creditor and inspector now claims that he is entitled to rank as a creditor upon this after acquired property for whatever balance remains to the extent of his claim, less the costs of the administration. Houghtby the trustee died in January, 1936, and Wild on the 12th May, 1938, applied to the Registrar *ex parte* for the appointment of a trustee in the place of Houghtby. The Registrar by order appointed the present trustee Totten and that order was subsequently confirmed by Urquhart J.

From that order this appeal is launched by the Thomas beneficiaries who contend that they are entitled to these moneys

under the will of the deceased; that the Bankruptcy Act does not confer on registrars jurisdiction to appoint trustees, and also that the Bankruptcy Court has no jurisdiction to confirm an order of the Registrar made without jurisdiction.

For the respondent it is contended that the Registrar had jurisdiction under sec. 159 to make the order appointing Totten; that the Court as defined by the Bankruptcy Act includes a registrar when exercising the powers of the Court, and that the Bankruptcy Judge has jurisdiction on the death of a trustee to appoint a new trustee.

The learned Judge in confirming the order of the Registrar relied on subsec. 2 of sec. 37 where power is given the Court to appoint a trustee for "cause," holding that death of a trustee was a cause.

If an application had been made to the Bankruptcy Judge for the appointment of a new trustee because of the death of the former trustee, sec. 37(2) would apply and an order made would be valid, but that is not the case at bar. The complaint here is that the learned Judge confirmed an order made by the Registrar appointing a new trustee who had no jurisdiction to make it.

The sole question is—had the Registrar jurisdiction? If he had no jurisdiction his order was invalid and the Bankruptcy Court would have no jurisdiction to confirm an order made without jurisdiction. Our inquiry therefore is to discover from the different provisions of the Act and Rules if the Registrar had jurisdiction.

The powers of the Registrar are to be found in sec. 159. Clauses (f) and (g) of that section read: (f) "To make any order or exercise any jurisdiction which by any rule in that behalf is prescribed as proper to be made or exercised in Chambers"; (g) "To hear and determine any unopposed or *ex parte* applications".

If the Registrar had jurisdiction the order made by him would be deemed an order or act of the Court. Court is defined in the interpretation sec. 2(1) of the Act as meaning, "The Court which is invested with original jurisdiction in bankruptcy under this Act."

Argument was advanced by Mr. Duncan that the order of the Registrar could not stand because it was made *ex parte* and without notice. Counsel for the respondent argued that the

application was *ex parte* and without notice because there was no creditor excepting the one (Wild) applying, and that it would be an absurdity to serve a notice upon himself and also that as there was only one creditor a meeting could not be held of creditors.

The learned Judge seems to have thought that as there was only one creditor a meeting of creditors could not be held. I have been unable to find any provision in the Act stating that a meeting of creditors cannot be called and held because of the fact that there was only one creditor, and we were not on the argument referred to any case so deciding. Since the argument I have found one case, *Re Carmen Thomas, Ex parte Warner* (1910), 55 S.J. 482, wherein it was decided that, if there is only one creditor present who has lodged a proof of claim, he forms a quorum and can carry a resolution for the appointment of a trustee.

My brother Riddell at the close of the argument referred counsel to the case of *East v. Bennett*, [1911] 1 Ch. 163, a company case where it was decided that the word "meeting" applied to the case of a single shareholder.

Mr. Duncan also supported his argument that the Registrar had no jurisdiction by reference to *Re Stuart and Sutterby* (1930), 65 O.L.R. 154, and, in appeal, 39 O.W.N. 282. I do not think that case is applicable. All that was decided was that the Registrar had no jurisdiction to act as a judge and to hear and adjudicate upon contested claims unless the matters in dispute were referred to him for trial by either a judge in bankruptcy or a judge of the Supreme Court.

I look upon the appointment of a trustee as a serious matter because in him the estate vests and with him rests the proper administration of the estate with at odd times the aid of the inspectors, and therefore his appointment should be in compliance with the Act. By the Act there are only two ways a trustee can be appointed, (1) at a meeting of creditors and (2) by a Judge for cause. The meaning of the word "cause" has been defined in *Re Herman* (1930), 11 C.B.R. 239, at p. 246.

Coming to the real question—the jurisdiction of the Registrar to make the order—my opinion is that the Registrar was without jurisdiction, under any of the subsections of sec. 159 to make the order. I cannot read clause (f) as meaning that the Registrar is given all the powers as to which a Judge has jurisdiction

in Chambers; therefore the order of the Registrar was made without jurisdiction and invalid and it would follow that the learned Judge in Bankruptcy had no jurisdiction to confirm an invalid order.

I would allow the appeal and set aside the order. The trustee has contested his appointment throughout and I see no reason why he should not pay all the costs of and incidental to his appointment and of this appeal.

HENDERSON J.A.:—An appeal from the order of Urquhart J. of September 7th, 1940.

The point raised is as to the jurisdiction of the Registrar in Bankruptcy to appoint a trustee.

It appears that by an order of the Registrar in Bankruptcy dated the 12th day of May, 1938, Kenneth Walter Totten purported to be appointed trustee of the debtor in the place and stead of C. A. Houghtby, deceased, and by the order appealed from it is declared that the order of the Registrar in Bankruptcy is a valid and subsisting order, and that the said Totten was duly appointed, and the order confirmed. The order then proceeds to direct an issue to try the claim of the trustee against David Thomas and Florence Ann Thomas as executor and executrix of the debtor, and that the question to be tried is whether they are liable to pay to the trustee all assets that came into their hands, and any other claim arising out of the administration of the estate.

It also appears that the only creditor of the deceased debtor is John William Wild, and that he is also sole inspector of the estate.

Section 37 of the Bankruptcy Act provides that the creditors shall at their first meeting appoint by ordinary resolution a trustee for the administration of the estate, and by subsec. 2 that the creditors may by ordinary resolution at any meeting, and the Court may for cause appoint a new trustee and remove a trustee who is in office, and by subsec. 7 that the Court upon being satisfied that there are assets which have not been realized or distributed under this Act, may, on the application of any person interested, at any time after the discharge of the trustee, as hereinafter provided for, appoint a trustee to complete the administration of the estate.

The jurisdiction in bankruptcy is found in secs. 152 to 159 of the Statute. The Court exercising jurisdiction in Ontario is the Supreme Court of the Province of Ontario.

Section 159 defines the powers of Registrars appointed by the Chief Justice under the provisions of sec. 157.

It is sought to support the jurisdiction of the Registrar to appoint a trustee under the provisions of (f) and (g) of sec. 159, which are as follows:

“(f) To make any order or exercise any jurisdiction which by any rule in that behalf is prescribed as proper to be made or exercised in chambers; and

“(g) To hear and determine any unopposed or *ex parte* application.”

Under the general procedure rules, I find in Bankruptcy Rule 4 the following:

“All matters and applications may be heard and determined in chambers unless the Court or a judge shall in the particular matter or application otherwise direct.”

Rule 15 provides:

“Where any party, other than the applicant, is affected by the motion, no order shall be made, unless upon the consent of such party duly shown to the Court, or upon proof to the satisfaction of the Court that notice of the intended motion has been duly served upon such party; provided that the Court, if satisfied that the delay caused by serving notice would or might entail serious mischief, may make any order *ex parte* upon such terms as to cost and otherwise, and subject to such undertaking, if any, as the Court may think just; and any party affected by such order may move to set it aside.”

The suggestion that the Registrar is authorized by 159(f) to make the order in question involves the proposition that that section confers upon the Registrar all the powers which a Judge has jurisdiction to exercise in Chambers. I cannot think that such a proposition is tenable. I think that this section, in defining the powers of the Registrar, means that any jurisdiction which the Registrar has conferred upon him may be exercised in Chambers, if the Rules so prescribe, and nothing more.

It seems equally clear to me that the order in question cannot be considered one that should be made *ex parte* and without notice.

It is conceded that in this instance the order was made *ex parte*, and also that no notice of the application was given to anybody.

I am therefore of opinion that the Registrar is without jurisdiction to appoint a trustee, and, that being so, the learned Judge in Bankruptcy is without jurisdiction to confirm an order made without jurisdiction.

As to the point discussed during the argument that a meeting could not be held where there is only one creditor, Riddell J.A. has called attention to the case of *East v. Bennett*, [1911] 1 Ch. 163.

In my opinion, therefore, the appeal must be allowed and the order set aside with costs here and below.

Appeal allowed with costs.

[URQUHART J.]

Rex v. Mustin.

Rex v. Millard.

Municipal Corporations—By-laws—Validity of by-law of municipality purporting to prohibit the distribution by hand to pedestrians of any pamphlet or printed notice—Powers of municipal council—The Municipal Act, R.S.O. 1937, ch. 266, secs. 268, 405, 429 and 440(3).

The council of a municipal corporation purported to pass a by-law prohibiting the throwing or offering by hand to pedestrians or passers-by of any pamphlet, circular, dodger or printed notices or matter of any kind.

Held, that the by-law was *ultra vires* of the council of the municipal corporation, since the by-law is not authorized by the provisions of The Municipal Act, R.S.O. 1937, ch. 266.

The question of distribution of circulars is dealt with fully by sec. 429 of The Municipal Act, which gives power to councils to pass by-laws licensing, regulating and governing bill distributors; but the power to license does not confer a power to prohibit. The second part of sec. 429 of the Act permits the enactment of by-laws prohibiting the distribution of posters, pictures or hand bills which are indecent or tend to corrupt morals. However, the present by-law was not limited in its scope to such posters, pictures or hand bills which were indecent or tended to corrupt morals. Nor could the by-law be justified under sec. 514(4) of The Municipal Act whereby municipal councils may prohibit the throwing of bills and paper upon the highway. The by-law here does not profess to prohibit the littering of the highway and the distribution which the by-law purports to prohibit does not necessarily involve such littering.

MOTIONS by accused to quash their convictions by a magistrate on charges that they did unlawfully distribute by hand to pedestrians certain pamphlets contrary to By-law 1084(4) of the Town of New Toronto.

The motions were heard by URQUHART J. in Chambers at Toronto.

F. A. Brewin, for the applicants.

W. E. Macdonald, for the Town of New Toronto and the informant.

October 2nd, 1940. URQUHART J.:—Application to quash convictions of the accused for breach of a by-law of the Town of New Toronto. The accused were charged that they did at the Town of New Toronto unlawfully within the municipal limits distribute by hand to pedestrians certain pamphlets contrary to By-law No. 1084(4). They were convicted and fined a nominal fine of \$1.00 and costs each, or in the alternative three days in jail.

The pamphlet distributed by the accused was unobjectionable. In fact it was rather patriotic in its nature.

The accused are labour men and were caught distributing the pamphlet outside of a factory on a street in New Toronto. The convictions are made under sec. 4 of By-law No. 1084, which by-law is entitled, "A By-law relating to and concerning the health, safety, morality and welfare of the inhabitants of New Toronto." It is hard to see how the distribution of or even the pamphlet itself would affect any of the above.

The preamble of the by-law follows the wording of the title but adds little to the professed scope of the by-law. It reads as follows:

"Whereas the Council of the Municipal Corporation of the Town of New Toronto deem it expedient to make regulations for the health, safety, morality and welfare of its citizens and inhabitants and for the good government of the Municipality."

Then the clause under which the conviction was recorded reads:

"4. No person, persons, firm, company or organization shall within the Municipal limits, distribute, throw or offer by hand to pedestrians or passers-by, any pamphlet, circular, dodger or printed notices, or matter of any kind, nor distribute or circulate printed matter of a class, nature, or kind calculated to cause, or which may be deemed likely to cause discomfort and unrest to or among the inhabitants or disturb the general peace of the community."

It appears that the accused were prosecuted first under the latter half of the clause, but the literature was held not to be of a nature the circulation of which the latter part of the section would prevent. A new charge was laid under the first half of the clause, that which purports to prohibit the distribution to pedestrians on the streets of any sort of printed matter.

The conviction of the accused is attacked on two grounds: (1) that the by-law is not such as The Municipal Act authorizes; (2) that the Province itself cannot totally prohibit the distribution of literature, that such would infringe upon the freedom of the press.

In the argument little or nothing was urged in favour of the legality of the by-law, the evils of the C.I.O. and their supposed infringement of the by-law being stressed. However, even if the operation of that body is objectionable to the municipality it cannot interfere with it except on clear legislative authority.

I gather that the by-law was passed under the authority of sec. 268 of The Municipal Act, R.S.O. ch. 266, which reads:

"Every council may pass such by-laws and make such regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act, as may be deemed expedient and are not contrary to law, and for governing the proceedings of the council, the conduct of its members, and the calling of meetings."

This section would permit the regulation of a great number of things, but as it will be noted its scope is limited by the words "in matters not specifically provided by this Act."

In *Morrison v. City of Kingston*, [1938] O.R. 21, Middleton J.A. pointed out (at pp. 25 and 26) the limitations put on the power of municipalities by the above restriction.

Now it seems to me that the question of distribution of circulars is dealt with amply by sec. 429.

By the first half of that section power is given to license, regulate and govern among other things bill distributors generally.

The power to license does not confer the power to prohibit. If the power to prohibit is given it must be given in a very definite manner: *Virgo v. City of Toronto*, [1896] A.C. 88, at p. 93.

The second part of sec. 429 permits the prohibiting of " . . . distributing of posters, pictures or hand bills which are indecent

or tend to corrupt morals." It seems to me that the full power which the Legislature intended to give to municipalities in respect of such distributions has been given by this section.

Under sec. 440(3) there is power given to prohibit the selling or offering for sale of books, periodicals, pamphlets or other printed matter except newspapers and magazines (which are dealt with specifically in the first part of the section).

This section applies to sales, but the fact of its being enacted indicates that the intention of the Legislature was not to empower a municipality to prohibit free distribution of the articles therein mentioned.

Section 405, particularly subsec. 42 which allows the prohibition of certain noises, and subsec. 43 which allows the prohibition of public nuisances and subsec. 45, which prevents the posting of indecent matter, all indicate also that the Legislature, while it intended municipalities like this one to have very wide powers, intended also that these powers should not be universal.

Counsel for the Town of New Toronto states that the section of the by-law in question would be authorized under sec. 514(4) of The Municipal Act, by which section municipal councils may prohibit the throwing of certain substances, including any bills and paper, upon the highway. The by-law does not profess to prohibit the littering of the highway and the distribution in question does not necessarily involve such littering.

I find therefore that sec. 4 of the by-law, if not the whole by-law, remembering the simile expressed by Latchford C.J.A. in the *Morrison* case that "a by-law may be compared with an egg. If bad in part it is bad everywhere," is beyond the powers conferred by the Legislature on the council of the municipality.

Mr. Brewin's second point may also be well taken. It may be beyond the powers of the Province, as he suggests, to confer any such power on the municipality as the municipality has taken unto itself in this case, but, as I think no such right was actually given, it is not necessary for me to decide this point.

The convictions will therefore be quashed and the town will pay the costs of the accused hereof but only as of one motion.

Convictions quashed.

[COURT OF APPEAL.]

Re Fell.

Real Property—Settled estates—Power of Court to authorize application of proceeds of sale of land in Ontario under The Settled Estates Act for the purchase of land situate outside of Ontario—The Settled Estates Act, R.S.O. 1937, ch. 117, sec. 23(c).

By sec. 23(c) of The Settled Estates Act, R.S.O. 1937, ch. 117, it is provided that money received on any sale of land under the authority of the Act may be paid to a trustee appointed by the Court or into Court and may be applied for "the purchase of other land to be settled in the same manner as the land in respect of which the money was paid".

Held, that the phrase "other land" in sec. 23(c) of the Act means land situate in Ontario, and the Court has no power to authorize the use of such moneys for the purpose of the purchase of land situate outside of Ontario.

A MOTION by Flora Pomeroy (formerly Flora Fell) for an order under The Settled Estates Act, R.S.O. 1937, ch. 117, authorizing the sale of certain land in Ontario and authorizing the use of the proceeds therefrom for the purchase of land in the Province of British Columbia.

August 8th, 1940. The motion was heard by HOPE J. in Weekly Court at Toronto.

J. M. Duff, for Flora Pomeroy, applicant.

J. M. Baird, K.C., Deputy Official Guardian, for infants.

August 12th, 1940. HOPE J.:—This is an application under the provisions of The Settled Estates Act for leave to sell a property in the City of Fort William in the Province of Ontario, devised under the will of the late Clarence Theophiles Fell to his wife for life and thereafter to his children, and to use the proceeds therefrom for the purchase of a home in the City of Victoria, in the Province of British Columbia.

The circumstances would appear to be as follows:

The widow of the deceased remarried, her second husband being one Pomeroy, and removed with her children by the first marriage to the City of Victoria where her present husband Pomeroy owned a property, and in which she and her children lived. This Victoria property is subject to a mortgage, on which an action for foreclosure has been commenced, judgment has been signed, and the time for redemption expires on the 30th August, 1940. In the hope of saving this property and on the understanding that it would be conveyed to her and her children on the same trusts as those on which the Fort William property is now held, the application is made.

It appears, however, that while the management of the Fort William property has been in the hands of the widow or her agent, and that she has been receiving the rentals therefrom, she has permitted the taxes thereon to fall into arrears to a certain extent.

It is not necessary for me to go into the respective values of the property, but from the representations made, it would appear that a contemplated sale of the Ontario property is for its present value and the Victoria property which would be redeemed from foreclosure is in value substantially more than the amount owing on the mortgage. The proposal might therefore be one which could be considered with approval if the property proposed to be purchased were in the Province of Ontario. I have, however, grave doubts as to the wisdom of permitting the proceeds of the infants' interests to be taken out of the jurisdiction of this Court and used in the way contemplated, particularly in view of the past history of the management of the infants' property by the widow. I therefore must dismiss the application in so far as the proposed purchase of the Victoria property is concerned.

If, however, it be still desired to sell the Ontario property and to pay the proceeds into Court, approval is hereby given, the moneys to be paid into Court and to be held on the same terms as the property, namely, that the income is to be paid to the widow in accordance with the terms of the will, and the corpus to be paid to the infant beneficiaries according to their rights. The payment of income however, to the widow, should be suspended until such time as the income from the resulting moneys in Court will accrue for the replacement of the amount now owing on taxes, which amount will have to be paid from the corpus of the proceeds of the sale of the real estate, thus depleting the corpus which should be restored before any further income is paid to the widow.

If the property is sold, the costs of this motion are to be paid out of the estate. If the property be not sold, then this application is dismissed with costs of the Official Guardian fixed at \$10.00, to be paid by the applicant.

Flora Pomeroy appealed to the Court of Appeal from the order of Hope J.

September 13th, 1940. The appeal was heard by ROBERTSON C.J.O., MIDDLETON and MASTEN JJ.A.

J. R. Cartwright, K.C., for Flora Pomeroy, appellant.

P. D. Wilson, K.C., Official Guardian, for infants.

September 20th, 1940. The judgment of the Court was delivered by MIDDLETON J.A.:—This is an appeal by the life tenant from an order of Hope J. dated August 12th, 1940, refusing an application to sanction the sale of the lands in question, and the purchase with the proceeds thereof, of other lands in the City of Victoria, Province of British Columbia.

The applicant is the widow of the owner of the lands in Fort William, and she desires that the lands in Fort William be sold and the proceeds applied in payment and discharge of a mortgage upon lands owned by her present husband, situate in Victoria.

The late Clarence Theophiles Fell was a dental mechanic residing at Fort William, who owned, free of encumbrance, a small parcel of land in that town. He departed this life on the 24th of December, 1932, having first made his will, dated the 14th of August, 1925. He evidently used a printed form for this will and neglected to complete the filling up of all the blanks therein. By this will he gave his wife his house on Franklin Street, with its entire furnishings for use during her life, to be disposed of at her death by his executors dividing the same equally between his children. It is conceded that this will operates upon the property and constitutes the wife tenant for life, and upon her death the property is to be equally divisible between the four children of the testator, all of whom are infants, Ralph, the eldest being born in December, 1925, and Beverley, the youngest, being born in 1932.

All of the debts of the testator have been paid.

On the 27th of August, 1934, the widow remarried, her husband living in Victoria. He owns there a house which is said to be worth considerably more than the house owned by her former husband, but this house is subject to a mortgage encumbrance. The mortgage has fallen in default and is about to be foreclosed. Mrs. Pomeroy now seeks to have the house owned by her former husband sold and to use the proceeds to pay off the encumbrance on the house owned by her present husband. He is quite willing that this should be done, and will

convey this property, so that it will be held upon the same trusts as the Fort William house. The proceeds of the Fort William house will discharge the mortgage encumbrance.

I am impressed with the desirability of what is proposed from the standpoint of the infants, but the Honourable Mr. Justice Hope, while likewise impressed with the desirability of the order, came to the conclusion that it could not, under the circumstances, be made.

The application was made under The Settled Estates Act, R.S.O. 1937, ch. 117. There is no doubt that this land is a settled estate within the meaning of that Act, and there is no doubt that a sale of this land would be in the interest of the infants. The Honourable Mr. Justice Hope expressed his readiness to make an order for the sale of this land, the proceeds to be paid into Court, but the applicant preferred to have the application dismissed.

Under The Settled Estates Act, sec. 23, all money to be received on any sale under the authority of the Act may be paid to a trustee appointed by the Court, or into Court, and may be applied from time to time for the purposes therein named. These purposes are, *inter alia*: "(c) The purchase of other land to be settled in the same manner as the land in respect of which the money was paid." In this section the expression "other land" means land in Ontario, and this is sufficient to justify the refusal of the order sought.

It is also plain that the Court ought not to sanction the investment in lands outside the jurisdiction of the Court, as a matter of principle and policy. These lands are subject to laws of which we know nothing, and they are subject to obligations of which we cannot readily keep track.

I have read all the cases referred to by Mr. Cartwright and a good many others, and I find nothing to justify the proposition that a settled estate can be purchased in another jurisdiction. The definitions in sec. 1 of The Settled Estates Act give no colour to the idea of purchasing land in another country.

Reading the English cases, one cannot fail to be impressed with the fact that settled estates in England are totally different from the small properties which fall under the provisions of this Act, and that the considerations which must guide the Court are difficult to apply to these small properties. The Settled Land Act is an Act in England passed *alio intuitu* and things are

said in cases under that Act which cannot be considered as at all applicable to these small affairs. The distinction between The Settled Estates Act on the one hand and The Settled Land Acts is emphasized in the case of *Bruce v. Aylesbury*, reported finally in [1892] A.C. 356. From the report in this case it will be seen that the Savernake Estate, which was there dealt with, consisted of a mansion house and about forty thousand acres of land, and it will be easily appreciated that what was there said of this vast estate can, with difficulty, be applied to the humble home of a dental mechanic in Fort William, which it is proposed to sell for some \$1,800.00.

The difference between the cases coming under The Settled Land Acts of 1882 and 1890 and cases under The Settled Estates Act, revised in 1877, is there carefully pointed out. The one was an Act passed for the purpose of enabling settled estates, particularly settled estates which were encumbered, from becoming practically a public obligation and a detriment to the State at large, and cases falling under the older Act, as pointed out, and the problems presented to the Court are entirely different, and this difference is emphasized in the judgments of all the law lords. The one is in reality akin to an encumbered estates Act, and the other Act was passed for a totally different purpose, as a substitute for the provisions of a private act, authorizing the sale of a settled estate. The one was to cope with a period of agricultural depression in which the vast settled estates had no place, and the other for a comparatively minor purpose of domestic management. It is necessary that this distinction be kept in mind to avoid the undue application of things which are said with regard to the one class of cases to totally different circumstances.

I would refer to this case as reported in the Court of Appeal, [1892] 1 Ch. 506. Mr. Justice Stirling had refused to authorize a sale. The Appellate Court, Lindley L.J., Bowen L.J. and Fry L.J. reversed him. These Judges, the greatest masters of equity probably that ever sat in a Court, dealt with the matter of the vast estate in financial difficulties in a way that leaves nothing to be desired, but in the case of *Beioley v. Carter* (1869), L.R. 4 Ch. App. 230, a case falling under The Settled Estates Act, there is much in support of this view. Sir G. M. Giffard L.J. at p. 240, refers to the origin of the Act. This Act "was originally passed to avoid the expense and delay of applying to the Legislature for a

Private Act in all cases where no power of sale or leasing were given by the settlement, and the provisions were framed as far as possible in conformity to the practice of the House of Lords with respect to Private Acts."

Mr. Cartwright also referred to a case of *Ormiston v. Alcott* (1881), 84 N.Y. Reports 339 (39 Sickels), but this case does not deal with the interpretation of any such statute as that here in question. It is there said that as a general rule investments by executors or testamentary trustees of the funds in their hands, who take these funds beyond the jurisdiction of the Court, will not be sustained, and the trustee who so invests may be held responsible for the safety of the investments, but this rule relates only to voluntary investments made by the trustee and does not govern a case where by the act of the testator a foreign investment has been made, or where, without the fault of the trustee the assets have been transmuted into a debt which can only be secured and saved by taking a foreign security. The judgment of the New York Court is expressed with great clarity, but it does not go beyond this. Finch J., who gave the judgment, states (at page 343), that he has been unable to find any statute or decision "which directly and in terms declares as the law of this State that an executor or testamentary trustee may not invest the funds in his custody under any circumstances in good mortgages on real estate situate outside the State. And yet the general drift of authority and considerations relating to the safety of trust funds seem to require that such should be regarded as the general rule and that investments beyond the jurisdiction of the Court should not be sustained unless in very rare and exceptional circumstances and under very unusual and peculiar circumstances."

I think the order sought in this case is clearly beyond the powers of the Court, and the appeal is therefore dismissed, with costs to be paid by the appellant to the Official Guardian. If the applicant now elects to take an order authorizing the carrying out of a sale of the Fort William property, the proceeds to go into Court, the order may be made. In that case the costs of all parties will be paid out of the estate.

Appeal dismissed.

[COURT OF APPEAL.]

Williams v. The King.

Taxation—Succession duty—Situs of shares of a mining company incorporated under the laws of the Province of Ontario—Shares owned by deceased who was domiciled in State of New York—Head office of company in Ontario—Transfer agencies established by company both in Ontario and in New York—Whether share certificates are specialties—Whether shares represented by share certificates located out of Ontario are subject to succession duty—The Succession Duty Act, 1934, 24 Geo. V, ch. 55, sec. 6(1).

The deceased, who died in the State of New York and who was domiciled in that State, was, at the date of his death, the owner of a number of shares of the capital stock of Lake Shore Mines, Limited, a company incorporated under the Ontario Companies Act, operating in Ontario and having its head office in Ontario. At the date of his death the share certificates were physically situate in the State of New York. By a by-law of Lake Shore Mines, Limited, the matter of stock transfers was dealt with in part as follows: "A stock transfer book shall be provided in such form as the directors may approve." By resolutions of the board of directors of the company registrars and transfer agents at the City of Toronto in the Province of Ontario and at the City of Buffalo in the State of New York were appointed, and a complete register of shareholders and complete transfer facilities were kept both at Toronto and Buffalo.

In the present proceedings the Treasurer of the Province of Ontario contended that the shares of stock of Lake Shore Mines, Limited, owned by the deceased were property situate in Ontario within the meaning of sec. 6(1) of The Succession Duty Act, 1934, 24 Geo. V, ch. 55, and that therefore the shares were subject to succession duty in Ontario.

Held by the Court of Appeal, affirming the judgment of McTague J.A., that the shares were not subject to succession duty in Ontario since they were not property situate in Ontario. The situs of the shares in question was at Buffalo in the State of New York, since the shares could be effectively dealt with there without anything further to be done in Ontario. By the law of the State of New York a general power is bestowed on foreign companies to establish transfer offices in New York State and the requirements of secs. 101, 102 and 107 of The Ontario Companies Act, R.S.O. 1937, ch. 251, that certain records of an Ontario company shall be kept in Ontario do not prohibit or limit the power of the company to establish and maintain a subsidiary transfer agency outside of Ontario under its general powers for the purpose of encouraging the investment of foreign capital and for the convenience of shareholders outside of Ontario; such a transfer agency in the State of New York does not infringe on or replace the Ontario office and records; it is additional and supplementary and is not prohibited by implication: *Erie Beach Company Limited v. Attorney-General for Ontario*, [1930] A.C. 161, distinguished.

Per Masten J.A.: *Semble*, that the shares in question should be considered as having their situs in New York State on the further ground that the share certificates in question, being under the corporate seal of the company, are specialties, and therefore the rule applies that the location of a specialty obligation is where the specialty is found at the time of the obligee's death.

AN appeal by The King from the judgment of McTague J.A., reported in [1940] O.R. 320, whereby it was declared that succession duty was not payable to the Treasurer of Ontario in respect of 10,200 shares of Lake Shore Mines Ltd., owned by the late Alexander Duncan Williams who died domiciled in the State

of New York, and that the sum of \$65,336.17 paid under protest by the executors of the will of the deceased should be refunded to them.

October 15th and 16th, 1940. The appeal was heard by ROBERTSON C.J.O., MIDDLETON, MASTEN, FISHER and HENDERSON JJ.A.

D. L. McCarthy, K.C., C. R. Magone, K.C., and L. McTavish, for The King, appellant.

Peter White, K.C., and E. Bristol, K.C., for the suppliants, respondents.

November 16th, 1940. ROBERTSON C.J.O.:—This is an appeal from the judgment of McTague J.A., before whom the action was tried, and who gave judgment for the plaintiffs.

I agree with the judgment of Masten J.A. that the appeal should be dismissed upon the ground first discussed in his reasons for judgment.

On the broad question whether an Ontario company, such as Lake Shore Mines, Limited, can establish an agency office in the State of New York—the head-office of the Company being fixed at some place in Ontario—where transfers of its shares may be made in its books in conformity with sections 56 and 60 of the Ontario Companies Act, the contention of appellant, on the argument of the appeal, that this cannot be done was rested, not on the ground that such an office can be established only within Ontario, but on the ground that the Company cannot provide for the making of such transfers at any place except the head-office of the Company, and in the book required by sec. 101 to be kept there.

In this connection I think there is some significance in certain changes made in the provisions of the Ontario Companies Act in 1897 by 60 Vic., c. 28, when the sections governing this matter assumed substantially their present form. The Act that had been in force—R.S.O. 1887, c. 157—provided in sec. 50 for the books to be kept at the head-office of the Company, such as is now done by sec. 101 of the present Act. Clause (f) of that section was as follows: “all transfers of stock, in their order, as presented to the Company for entry, with the date and other particulars of each transfer and the date of the entry thereof.”

In the Act of 1897 there was substituted for the foregoing what is now clause (g) of sec. 101, with this one difference, that the word "stock" was used where "shares" now appears.

Then, in the Act as it was in the revised statutes of 1887, immediately following the provisions of sec. 50 as to the books to be kept at the head-office, there followed, in sec. 51, this provision, "The directors may refuse to allow the entry into any such book of any transfer of stock whereon any call has been made which has not been paid in." The words "any such book" would seem to refer directly to the book required to be kept at the head-office by sec. 50(f).

From the Act of 1897 this sec. 51 was omitted, but another provision was made in another part of the Act as to the entry of transfers of shares not fully paid. This provision was made in sec. 27, which was in its effect similar to sec. 57 of the present Act, and followed a provision in sec. 26 very similar to subsec. 1 of the present sec. 56. Section 27 of the Act of 1897 contained the words "in any such book," as had the former sec. 51, but the reference was not to any book expressly required to be kept at the head-office, but simply to "the books of the company."

I think these changes made in the Ontario Companies Act in 1897 indicate an intention to remove any restriction that confined the making of transfers of shares to the head-office of the company.

In any event a very general practice has become established on the part of Ontario companies, having any considerable number of shares in the hands of the public, to provide for the transfer of shares at the office of a trust company or some such place where a convenient service for that purpose has been set up.

With respect to the case of *Erie Beach Company Limited v. Attorney-General of Ontario*, [1930] A.C. 161, it seems to me that the broad distinction between that case and the present is that in the *Erie Beach* case the company had not provided for the transfer of its shares at any place but the head-office of the company, while in the present case the company had expressly provided by resolution of the board of directors for the transfer of its shares at the office of the Manufacturers and Traders Trust Company in Buffalo.

MIDDLETON J.A.:—I agree that this appeal must be dismissed, but I prefer to rest my judgment upon the first ground discussed

by Mr. Justice Masten. On the second ground I am far from saying that I would not ultimately accept his reasoning, but at the present time the matter appears to me to be one of some difficulty.

In the present case the same conclusion is arrived at on each of the two grounds; but if the facts had been slightly different then these two grounds would conflict. If these shares had been found to be *bona notabilia* elsewhere than at the domicile, duty would be payable upon them where found, and a conflict would then arise. It may be that the express statement found in section 56, subsec. 1, that the shares are to be "personal estate" will be found to be sufficient to prevent this result. I would desire to hear this matter fully argued, and, therefore, leave it open and express no opinion upon it. It is not necessary for the decision of this case that I should do so.

MASTEN J.A.:—The present proceeding is a petition of right to recover from the Crown in Ontario the sum of \$65,336.17 paid under protest as succession duties in respect of certain shares in Lake Shore Mines, Limited.

The appeal to this Court is from the judgment of McTague J.A., dated the 15th May, 1940, whereby it was adjudged that succession duty was not payable to the Province of Ontario in respect of the shares in question, and that the duty theretofore paid under protest by the suppliants ought to be refunded to them.

The Lake Shore Mines, Limited, is a company incorporated under the Ontario Companies Act and having its head office at Kirkland Lake in Ontario with subsidiary agencies for recording transfers of shares at Toronto, Ontario, and at Buffalo, in the State of New York. Its shares are listed and dealt with on various stock exchanges outside Ontario.

According to the evidence the shares were interchangeably transferable at Toronto and at Buffalo.

The petitioners are Eva May Williams and Reginald Victor Williams, executors of the will of Alexander Duncan Williams, who died domiciled in Buffalo, New York, and who at his death was the owner of 10,200 shares in the Lake Shore Mines, Limited. all evidenced by share certificates duly issued by the company under its corporate seal, which share certificates the petitioners claim to have been transferable in the transfer agency of the company in Buffalo, namely, at the office of the Manufacturers

and Traders Trust Company. The said share certificates were at the time of the death of Alexander Duncan Williams in his actual possession in the City of Buffalo.

On May 2nd, 1940, the suppliants, having obtained in New York State letters probate of the will of Alexander Duncan Williams, transferred the shares in question on the records kept in Buffalo by the agents of the company from the name of Alexander Duncan Williams to their own names.

I am of opinion that on two grounds this appeal should be dismissed.

First, because in my opinion the shares in question, being the property of Alexander Duncan Williams domiciled in Buffalo, could be and were effectively transferred at the transfer office of the Lake Shore Mines, Limited in Buffalo, and were therefore "locally situated" out of the Province of Ontario; consequently, as the situs of the shares was in Buffalo and their transmission and transfer was effectively carried out there, succession duties are not recoverable by Ontario.

Secondly, (though with some hesitation), I am of opinion that the share certificates held by Alexander Duncan Williams at his death were "specialties" locally situate in Buffalo, and, consequently, the shares evidenced by them were not liable to succession duty in Ontario.

With respect to the ground first above mentioned, I agree with the conclusion of my brother McTague, and concur in his reasons, but desire to add certain further observations.

In the judgment below it was clearly demonstrated that Lake Shore Mines, Limited (being incorporated under an Ontario Charter) is a common law corporation possessing the capacity to acquire in the State of New York such powers as may be bestowed upon it in that jurisdiction. I understand that this constitutional capacity of the Lake Shore Company is not challenged by counsel for the appellants, nor do they controvert the evidence of the witness Moore that the "Stock Corporation Law of New York requires foreign stock corporations doing business in New York State to maintain by itself or agent a stock book showing the names of the shareholders, their address and the number of shares held by it. That may be kept in the office of the transfer agent or the office of the Corporation if it has an office other than that of its transfer agent."

Such a law necessarily implies a general power bestowed on foreign companies to establish a transfer office in New York State.

If the general power so exercisable by the Lake Shore Company is not prohibited or limited by the Ontario Companies Act, or by the charter or by-laws of the Company, then the directors had, in my opinion, power by resolution to establish legally in Buffalo a transfer agency and the shares in question were effectively transferable there.

If the general power so conferred was lawfully exercised when the transfer agency in Buffalo was established, then we are bound by the decision of this Court in *Re McFarlane*, [1933] O.R. 44, to hold that the shares in question were "locally" situated in Buffalo and to dismiss this appeal.

In that case the Province of Ontario claimed succession duty in respect of shares in the International Nickel Company, a company incorporated under The Dominion Companies Act. The deceased was domiciled in Montreal and died there. Before his death the company had established a transfer agency in Montreal, though the head office of the company was at Copper Cliff in Ontario. The Surrogate Judge, before whom the case came in the first instance, determined that *McFarlane's* estate was not liable for succession duty.

At page 46 of the report the Surrogate Judge says:

"Mr. Garvey stresses the provision of sec. 77 of the Dominion Companies Act, R.S.C. 1927, ch. 27, which provides that no transfer of shares, 'shall be valid for any purpose whatever until entry of such transfer is duly made in the register of transfers.'

"What is meant by the 'register of transfers?' No such register is kept at Copper Cliff. If not, then if these shares were transferred at Montreal there is nothing required to be done within Ontario to vest the shares in the transferor.

"It is, I think beyond doubt that the shares in question is the kind of stock dealt with in sec. 77(2) and a transfer thereof at any transfer agency of the Company 'constitutes a valid transfer,' except for the purpose of voting."

The Crown appealed to the Court of Appeal, and by a unanimous judgment the appeal was dismissed.

Judgment was delivered orally by Mulock C.J.O., as follows:

"The only power that the Province would have to tax the shares in question would be if it were entitled to intercept their

transmission within the Province but it has not such right in the present case. The Province cannot object to a Dominion company creating transfer agencies outside of Ontario, and the mere presence of the head office in Ontario is not enough to give the Province the power to tax these shares. Transfer of shares in the company can be completely effected at any one of the four places where the company has created transfer agencies. The Companies Amendment Act (Dominion), 1932, 22-23 Geo. V. ch. 27, sec. 4, which is retroactive in effect, is conclusive in favour of the power of the company to create transfer agencies outside of Ontario. The appeal is dismissed with costs."

This case is referred to with approval in an illuminating judgment of the Court of King's Bench of Quebec, viz., *Re Thorburn, Ivey et al. v. The King*, [1939] 1 D.L.R. 631. The head-note in that case reads as follows:—

"Shares in Dominion and Quebec Companies whose head offices were in Montreal but which maintained transfer registries in the Province of Ontario where they were listed on the Stock Exchange and where their certificates in strict form and transferable by endorsement only were found upon death of their owner, held 'situate' in Ontario and hence not subject to succession duty under sec. 4 of the Succession Duties' Act, R.S.Q. 1925, ch. 29."

The facts are very similar to those of the present case. At page 642, Mr. Justice Walsh refers to section 4 of The Companies Act, 1932 (Canada) ch. 27, and points out that difficulty had arisen respecting the registration of such shares because a custom had been introduced to establish branch offices elsewhere than at the head office of the company, and he continues:

"It was to settle the matter that this legislation was passed. The law was not amended. It was only declared that the establishment of branch offices had always been lawful . . .

"As a matter of fact, no change was made. There was only recognition of a state of affairs and of the law governing these."

The same view was expressed by Rivard J., and, at page 648, St. Jacques J. says:

"Parliament was facing a state of affairs created by the companies themselves under the authority of an Act which did not prohibit establishment of transfer offices elsewhere than at head offices and by this statute it simply stated what the real meaning of the Act was. It did not change or modify it in any

way. There can be no question here of retroactivity, for this statute enacts nothing new to which it gives a retroactive effect; the Legislature looked backwards and defined once and for all what it intended to say by the text of subsecs. 77, 118 and 119 of the Act."

Counsel for the appellant seek to distinguish the cases just quoted on the ground that the Ontario Companies Act coupled with the charter and by-laws of the Lake Shore Company preclude the company from establishing transfer agencies out of Ontario.

I agree with the observations of my brother McTague when dealing with that question, but out of respect for the arguments of appellant's counsel I proceed to consider it somewhat further.

The sections of the Ontario Act relied on by the appellants are sections 101, 107 and 102, which read as follows:—

"101. The corporation shall cause the secretary, or some other officer specially charged with that duty, to keep a book or books wherein shall be kept recorded,—

"(a) a copy of the letters patent and of any supplementary letters patent issued to the corporation and, if incorporated by special Act, a copy of such Act, and the by-laws of the corporation duly authenticated:

"(b) the names, alphabetically arranged, of all persons who are and who have been shareholders or members of the corporation;

"(c) the post office address and calling of every such person while such shareholder or member;

"(d) the names, post office address and callings of all persons who are or have been directors of the corporation, with the date at which each person became or ceased to be such a director;

"and in the case of a corporation having share capital,—

"(e) the number of shares held by each shareholder;

"(f) the amounts paid in, and remaining unpaid respectively, on the shares of each shareholder;

"(g) the date and other particulars of all transfers of shares in their order."

"107. The directors shall cause proper books of account to be kept containing full and true statements of,—

"(a) the financial transactions of the corporation;

"(b) the assets of the corporation;

“(c) the sums of money received and expended by the corporation, and the matters in respect of which such receipt or expenditure took place;

“(d) the credits and liabilities of the corporation;
“and a book or books containing minutes of all the proceedings and votes of the corporation, or of the board of directors, respectively, verified by the signature of the president or other presiding officer of the corporation.”

“102(1) The books mentioned in sections 101 and 107 shall be kept at the head office of the corporation within Ontario, whether the company is permitted to hold its meetings out of Ontario or not.”

The by-law relied on by the appellant is paragraph 17 of by-law two, as follows:—

“17—A stock transfer book shall be provided in such form as the board of directors may approve of and all transfers of stock in the capital of the company shall be made in such book and shall be signed by the transferor or by his attorney duly appointed in writing, stock certificates shall be in such form as the board may approve of and shall be under the seal of the company and shall be signed by the President or Vice-President and the Secretary or such other officer in place of the Secretary as the board may by resolution authorize.”

The resolution of the Board of Directors establishing a transfer agency in Buffalo was passed on the 18th day of May, 1927, and is as follows:—

“Resolution passed at a meeting of directors
of Lake Shore Mines Limited held at Kirkland
Lake, Ontario, on May 18, 1927.

“Moved by Mr. Martin, seconded by Mr. Wright, that the Company hereby designate and appoint Manufacturers and Traders Trust Company of Buffalo, New York, as an additional Registrar and Transfer Agent at which office shareholders may have their stock registered and transferred within the United States of America.

Carried.”

The Companies Act of Ontario does not appear to contain any express provision enabling the company to establish a transfer agency outside the boundaries of Ontario, nor on the other hand does it contain any express provision prohibiting such action. As already pointed out, authority to establish transfer

agencies outside Ontario arises out of the wide general powers exercisable by the Lake Shore Mines, Limited as a common law corporation, and its capacity to receive authority from New York State to exercise in that State its power to appoint a transfer agent.

I venture to say that if such general power is to be curtailed or in any particular prohibited, such limitation or prohibition must clearly appear. Here, in the absence of any express provision, such prohibition must in order to be effective appear as a clear and certain inference from the words of the statute, the charter or the by-laws. All I can say is that after careful examination of these documents I can find no basis for drawing an inference of prohibition or limitation.

The requirements of secs. 101, 107 and 102 that certain records shall be kept in Ontario, or kept at the head office in Ontario, is a positive obligation, but it does not prohibit or limit the power of the company to establish and maintain a super-numary or subsidiary transfer agency at Buffalo under its general powers for the purpose of encouraging the investment of foreign capital and for the convenience of shareholders in that country. Such an agency does not infringe on or replace the Ontario office and records. It is, as I have indicated, additional and supplementary, and is not, in my opinion, prohibited by implication.

By-law 17 appears to me to be authorized by section 91 of the Act. It provides in general terms for the transfer of shares, leaving the details of how and where to be dealt with by the directors by resolution. It contains nothing which negatives their power to open for the convenience of shareholders a subsidiary transfer agency in Buffalo.

In this connection I refer to sec. 56, subsec. 1, which provides as follows:

"The shares of the company shall be deemed Personal estate and shall be transferable on the books of the company in such manner and subject to such conditions and restrictions as by this Act, the special Act, the letters patent, supplementary letters patent or by-laws of the company may be prescribed."

With respect to the case of *Erie Beach Company Limited v. Attorney-General for Ontario*, [1930] A.C. 161, I agree with the conclusions of McTague J.A. and with his reasons. The observations of Lord Merrivale to the effect that shares of an Ontario

company can be effectively transferred only at the head office of the company appear to be *obiter* and not warranted upon the true construction of the Act.

There are no words in the Act establishing a "register of shares" where and where *only* a transfer of shares can be recorded. Indeed the term "register of shares" nowhere appears.

As pointed out by counsel for the respondents, the words "register," "share register" or "transfer book" are not to be found in the Ontario Act which is entirely different in the provisions of sections 101, 102 and 56 from anything to be found in the Imperial Companies Act.

A careful comparison with the Ontario Act of the provisions of the Imperial Companies Act and the requirements thereby prescribed convinces me that their requirements and practice can form no guide in the determination of the present case.

For these reasons I am of opinion that a transfer agency was legally and effectively established in Buffalo, and that the shares in question were effectively transmissible and transferable in Buffalo.

I proceed to consider the suggestion that the share certificates in question are "specialties"; make the shares covered by them "*bona notabilia*" at the place where the certificates are found, and in the present case fix the local situation or situs of the shares in Buffalo.

Shares possess various attributes according to the aspect in which they are viewed.

In *Borlands Trustee v. Steel Brothers & Co.*, [1901] 1 Ch. 279, at page 288, Farwell J. says:

"A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with sec. 16 of the Companies Act, 1862.

"The contract contained in the articles of association is one of the original incidents of the share. A share is not a sum of money settled in the way suggested, but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount."

In 5 Halsbury, 2nd Ed., at par. 438, the attributes of a share are described as follows:

"A share is a right to a specified amount of the share capital of a company carrying with it certain rights and liabilities while the company is a going concern and in its winding up. The shares or other interest of any member in a company are personal estate transferable in the manner provided by its articles and are not of the nature of real estate."

And, at par. 256, it is said:—

"While the articles regulate the rights of the members *inter se* they do not it would seem constitute a contract between the members *inter se* but only a contract between the company and the members."

See also the definition of a share by Lord Wrenbury in *Bradbury v. English Sewing Cotton Co.*, [1923] A.C. 744, at p. 767.

In 14 *Corpus Juris* the definition is as follows:

Certificates of stock, together with the charter or articles of incorporation and the statute under which the corporation was organized, are evidence of a contract between the corporation and the persons named therein or subsequent holders thereof by proper assignment and transfer, and between the various stockholders, by which each holder is the owner of the shares of stock represented by his certificate, and entitled as such to participate in the management of the corporation, in surplus profits, and upon dissolution, in all of "its assets remaining after the payment of its debts."

No doubt in one aspect the share certificate given to the shareholder under the seal of the company is a mere assurance of title by which the company is estopped from denying the shareholder's interest; but in considering whether it is a specialty, the attribute to be considered is that the share certificates in question are written acknowledgments under seal witnessing mutual obligations between the shareholder and the company.

As has frequently been pointed out, the share certificate is not primarily a contract, though the ownership of the share arises out of a contract as more clearly appears from a consideration of the transaction when an application for shares is received by the company, and shares are allotted by the company for consideration given by the applicant. The share certificate to which the applicant is by law then entitled evidences an obli-

gation in law under the corporate seal of the company to pay to the shareholder his proportionate share of all dividends as and when declared and to give him his proportionate share in the net assets upon a winding-up. I think that for the purpose of ascertaining the local situation of the shares in question as a basis for liability to succession duty the share certificates being under the corporate seal of the company should be held to be specialties and to give the shares in question a local situation in Buffalo.

The question was considered and dealt with in *Re Drogheda Steampacket Co. Ltd.*, [1903] 1 I.R. 512, where the headnote reads as follows:

"Dividends on ordinary shares in a Company had been declared and became payable more than six and less than twenty years before the claims for them were made by the shareholders.

"Held, that the share certificates, as governed by the articles of association, constituted a specialty debt, and that consequently the arrears of dividend were recoverable after the lapse of six years."

The argument in favour of the claim was that the share is an interest in the company proportionately to the sum subscribed, and is subject to the rights and liabilities regulated by the Articles of Association, one right of which is that the shareholder shall be paid his dividend, and the company has admitted the right to one share by the certificate which is under seal. The dividend is a mere adjunct to the share and goes with the share, and the certificate in admitting the right to the share admits the right to the dividend. The judgment is that of the Master of the Rolls, who, among other things, observed:—

"The share certificate confers a right to a portion of the property of the Company on a shareholder by reason of a contractual relation between the shareholder and the Company." And "the profits of the company are divisible among the holders of shares in proportion to the amount paid. The right to the shares is evidenced by a certificate under the seal of the Company, and the certificate constitutes a specialty obligation, and such certificate incorporates the Articles of Association and gives the holder a right under a specialty contract to dividends." And he refers in support of his view to *Smith v. Cork and Bandon Ry. Co.* I.R. 5 Eq. 65; 22 L.J.C.P. 198.

That case was followed in 1904 by Byrne J. in *In re Artisans' Land and Mortgage Corporation*, [1904] 1 Ch. 796. Counsel for

the shareholder relied on the *Drogheda* case, and Byrne J., in the course of his judgment, after referring to all the preceding cases that had been cited to him, concludes:—

“If the decisions are right, and, in my judgment, they are right, that the dividends are due under a specialty, the same principle appears to me to apply in the case of returns of capital; and, therefore, the period of twenty years is the period of limitation.”

See also *Benson v. Benson*, 1 P. Wms. 130, and *Buck v. Robson* L.R. 10 Eq. 639.

For these reasons I think that for the purpose of determining the *situs* of the shares in question as founding a liability to succession duty, the share certificates in question are to be regarded as specialties in the hands of the testator.

But I express that view with diffidence, not only because we have not had the advantage of argument on the point, but also because of the observations to be found in the 15th Edn. of Palmer's Precedents, Part 1, at page 727, and in 5 Halsbury at page 421.

If the share certificates are specialties then the rule applies that the location of a specialty obligation is where the specialty is found at the time of the obligee's death. *Commissioner of Stamps v. Hope*, [1891] A.C. 476.

A recent application of the rule is found in *The King v. National Trust Company*, [1933] S.C.R. 670.

The case involved a claim by the Province of Quebec for succession duties in respect of bonds of the Grand Trunk Pacific Railway and bonds of the Canadian National Railway Company whose head offices were in Montreal at which place the bonds were registered. The bonds belonged to the estate of Sir Clifford Sifton who died domiciled in Ontario. At his death the bonds were in his possession in Toronto. It was held that they were specialties and, as such, were “locally situate” in Toronto with the result that the claim of the Province of Quebec was denied.

In that case the Chief Justice of Canada, in entering upon his reasons, says: “The question we have to consider is whether or not these bonds have, in the relevant sense, a local situation within that province (Quebec).

“Some propositions pertinent to that issue may, we think, be collected from the judgments of the Judicial Committee of the

Privy Council, and if not laid down explicitly, are at least, implicit in them."

I forbear to quote at length his admirable summary of the rules and principles relevant in such cases as the present, save only the last which reads as follows:—

"The circumstances of a particular case may be such that to them none of the rules formulated and applied in decided cases or books of authority is strictly appropriate; and then one must have recourse to analogy, and to the principles underlying the decisions or the rules as formulated or deducible therefrom. *N.Y. Life Ins. Co. v. Public Trustee*, [1924] 2 Ch. 101 at 119, 120."

Bearing in mind these rules and principles, I conclude on both of the grounds as discussed that the shares in question were at the death of Alexander Duncan Williams locally situate without Ontario.

In the foregoing reasons I have attempted to state the legal considerations which in my view directly locate the *situs* of these shares in Buffalo; but I think it not irrelevant to mention certain other facts and circumstances which indirectly bear upon the question.

Some of these circumstances are:—

1. That the property in these shares was completely vested in A. D. Williams domiciled and resident in Buffalo and devolved upon and was transmitted to the respondents on the issue to them of letters probate in New York State. *Stern v. The Queen*, [1896] 1 Q.B. 211; *Provincial Treasurer of Alberta v. Kerr*, [1933] A.C. 710, at 721; *Re Clark, McKechnie v. Clark*, [1904] 1 Ch. 294.

2. Consequently the shares were subject to succession duty in Buffalo and have been so taxed and some \$88,000 paid (Evid. p. 58). If the judgment is reversed it will result in double taxation.

3. If appellant succeeds the result will be that shareholders in Ontario companies domiciled in the United States, or elsewhere out of Ontario, will be liable for double succession duty. This may well result in their shares being thrown in an avalanche on the market with disastrous economic effects, so that it may become difficult to float abroad the securities of Ontario companies.

4. The share certificates were in Buffalo and were marketable there. The commercial practice is referred to by Duff J., as he

then was, in *Secretary of State v. Alien Property Custodian*, [1931] S.C.R. 170, at page 190, where he says:—

“The law of this country as applicable to the corporations with which we are concerned, recognizes that shares, and particularly those which are regularly the subjects of trading on stock exchanges are sold and bought by the delivery of a certificate accompanied by a transfer executed in blank, and that the market price of the shares is paid upon delivery, which is treated as the execution of the sale, because it confers upon the person receiving the document a title, as Lord Watson says, in the case already cited, ‘legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner’.”

5. If this appeal were to be allowed, an unfortunate situation might well arise if a buyer of shares on a foreign exchange in pursuance of the custom above noted should find, when he came to have them transferred to his own name, that such transfer was impossible because the recorded transferor was dead and no clearance had been obtained from the Succession Duty Department.

These circumstances do not bear directly on the legal question which we have to determine. They are matters rather for consideration by the Legislature. None the less they are not entirely irrelevant and do have an indirect bearing because they tend to induce the Court to examine critically the arguments put forward by the appellant in the present case and to lean against a construction which would place the *situs* of these shares in Ontario.

I would dismiss the appeal with costs.

FISHER J.A.:—The Crown in right of the Province claims that a large number of shares in a company incorporated under the Ontario Companies Act as Lake Shore Mines, Ltd., and owned by one Williams, an American citizen domiciled in Buffalo, and now deceased, are liable to the payment of succession duties. The claim is resisted by the executors of the estate of the deceased.

The learned trial Judge, McTague, J.A., was of the opinion that the *situs* of these shares was in the United States of America and constituted property outside the Province of Ontario. The

head office of the company is in Ontario, where the usual books of the company for the purpose of carrying on the administration of the company are kept. By resolutions of the directors The Trusts and Guarantee Company Limited was appointed transfer agent and registrar of the capital stock of the company in Toronto, and the Royal Trust Company was appointed registrar of the company's stock in the City of Toronto. Because of the fact that the stock of the company was listed for sale and was being sold on the exchange in New York, a resolution was passed designating and appointing the Manufacturers and Traders Trust Company of Buffalo, New York, as an additional registrar and transfer agent in Buffalo, where shareholders could have their shares registered and transferred in the United States.

It is not in controversy that for years the American shareholders in the company completed sales of their shares and through the Buffalo agency had new certificates issued and registered in the name of purchasers. Ample provision seems to have been made for the officials of the company in Toronto and Buffalo to make known to one another the transfers and the issue of new certificates to purchasers.

For the Crown it is contended that the head office of the company being in Ontario there was no power in the company under the Ontario Companies Act to set up a transfer office in Buffalo, and cited in support of that contention *Erie Beach Co. v. Ontario*, 63 O.L.R. 469, and [1930] A.C. 161. As the learned trial Judge has in his reasons clearly distinguished that case from the case at bar, and has fully considered the relevant sections of the Ontario Companies Act—in which there is to be found no prohibition as to establishing a transfer office outside of Ontario—the status and capacity at common law of an Ontario company and particularly what was decided in the *Bonanza Creek case* [1916] 1 A.C. 566, and the other cases, to which he has made reference, no useful purpose is served by a repetition of what has been so accurately stated by him. I fully agree with his reasons and conclusions.

In my opinion, as Williams had the physical control of the certificate of these shares up to the time of his decease and as they were registered in his name thereby evidencing ownership in him of property in the United States of America, and of property which he could have sold and effectively transferred at any time to a purchaser in the United States of America, and also

could have assigned or pledged as security in a commercial transaction to an American citizen, that the *situs* of the shares was in the United States of America, and were not property situate in Ontario and liable to succession duty.

I agree with the reasons and conclusions of my brother Masten and desire to state that his learned and exhaustive reasons in dealing with his second ground for dismissing the appeal will be of great benefit to the profession.

HENDERSON J.A.:—An appeal from the judgment of McTague J.A. of May 15th, 1940.

I concur in the judgment of the learned trial Judge and in his reasons therefor.

I have had the privilege of reading the opinion of my brother Masten, and I agree that the second ground discussed by him for dismissing the appeal is not necessary to the judgment of this Court. I prefer to express no opinion as the point was not argued. It is, however, of great interest from the standpoint of Canadian company law.

Appeal dismissed with costs.

[COURT OF APPEAL.]

Fogg v. The Town of Kenora.

Highways—Sidewalks—Sloping sidewalk—Presence of ice and snow—Pedestrian injured by fall—Non-repair of sidewalk—Cause of accident—The Municipal Act, R.S.O. 1937, ch. 266, sec. 480(3).

Where a sidewalk in a municipality is in a state of non-repair by reason of an excessive slope and a person is injured as the result of a fall on the sidewalk, and the fall is directly caused by the combination of the excessive slope and the presence of ice on the sidewalk, the plaintiff is entitled to recover from the municipality even if there is no negligence on the part of anyone as to the presence of ice on the sidewalk. In such a situation the principle should be applied that where two causes have contributed directly to an injury, the person injured may recover with respect to one of the contributing causes; the presence of a second cause should not have the effect of exempting the municipality from liability in regard to the first cause.

AN appeal by the defendant from a judgment of Greene J. whereby the plaintiff was awarded the sum of \$4,000 for injuries sustained as the result of a fall on a sidewalk of the defendant municipality.

November 5th and 6th, 1940. The appeal was heard by ROBERTSON C.J.O., FISHER and GILLANDERS JJ.A.

J. R. Cartwright, K.C., for the defendant, appellant.

A. A. Macdonald, K.C., for the plaintiff, respondent.

November 29th, 1940. ROBERTSON C.J.O.:—An appeal from the judgment of Greene J. dated 10th June, 1940, by which he awarded the respondent, the plaintiff in the action, \$4,000 damages for injuries sustained by falling on a sidewalk of the appellant municipality.

The learned trial Judge found that the sidewalk was seriously out of repair by reason of the fact that the slope of the sidewalk from one side to the other was $1\frac{1}{5}$ inches per foot, whereas standard engineering practice allows as a maximum only $\frac{3}{4}$ of an inch per foot, the usual slope being much less. The surface of this sidewalk which was 8 feet wide, was approximately 10 inches higher at one side than at the other. The sidewalk had been in this condition over a period of years, and the learned trial Judge found negligence on the part of the appellant in this regard, and this finding is the basis of his award of damages.

The learned trial Judge found that at the time of the respondent's accident the surface of the sidewalk was slippery and dangerous to pedestrians by reason of ice and snow upon it, but he made no definite finding as to whether or not there was gross

negligence on the part of appellant in this regard. The accident occurred at about 9 p.m. of a December day, and the trial Judge expressed grave doubt whether the failure of the appellant to put sand upon the sidewalk in the evening after a mild day amounted to gross negligence in the circumstances.

It was objected for the appellant that the statement of claim upon which the action went to trial did not mention the excessive slope of the sidewalk as a matter complained of. The statement of claim did not in fact specify any non-repair of the sidewalk except to say that the fall of the respondent "was due solely to the icy and slippery condition of the said highway, and to the gross negligence of the defendant in failing to keep the said highway in a proper state of repair, and in permitting an accumulation of ice and/or ice and snow to remain upon the said highway." The learned trial Judge in his reasons for judgment said that the statement of claim was not as clear as it might be, and that it might possibly be argued that these allegations referred only to snow and ice, although that was not his own opinion. To avoid the possibility of misunderstanding he granted leave to the respondent to amend his statement of claim by pleading general non-repair of the highway at this point. In pursuance of the leave so granted the respondent then amended the statement of claim by alleging that the sidewalk at the point in question was, at the time of the accident, in a serious state of non-repair, but made no further statement of the nature of the non-repair. The evidence of the slope of the sidewalk was given without objection, and the town engineer, who was called for the defence, was questioned in regard to it, and not only agreed with the evidence of the surveyor called for the respondent, but supplemented it in a material way. I do not think this Court should interfere with the exercise of discretion by the trial Judge in allowing the amendment. Reference may be made to the recent judgment of this Court in *Can. Industries v. C.N.R.*, [1940] O.W.N. 452.

I see no reason to disagree with the finding of the trial Judge that the sidewalk was in a state of non-repair by reason of the excessive slope. This condition had existed for years, and it was not suggested by any witness that it could not be corrected at reasonable expense. Neither do I see any reason to disagree with the finding of the trial Judge that this state of non-repair was a direct cause of the injuries complained of.

No doubt respondent would not have fallen if there had been no ice or snow covering the surface of the sidewalk, but it was ice or snow upon a sloping sidewalk. The two causes combined and both directly contributed to make the sidewalk dangerous to walk upon. It must, I think, be assumed that at Kenora there will be ice and snow in substantial quantities on numerous occasions in every year, and that a sidewalk with such a slope as this sidewalk will, on that account, inevitably become in a dangerous condition. It is something that must be contemplated by whoever is responsible for maintenance of the sidewalk.

There have been many cases where two causes have contributed directly to an injury, and where the injured person has been held entitled to recover against a person from whose negligence either one of the causes arose. *Crane v. South Suburban Gas Co.*, [1916] 1 K.B. 33 is an instance. In that case the defendant Gas Co. was engaged in repairing a gas-pipe in a highway. It was necessary for the purpose of making the repairs to have a fire and some molten lead on or adjacent to the highway. The fire was in a pail and the molten lead was in a ladle resting on the fire, and both had been placed close to the paved portion of the foot-way. A boy walking along the highway accidentally knocked against the pail and upset it, and the molten lead was spilled on the plaintiff—a young child—who was near, and it was held that the Gas Co. was liable because it should have foreseen that the result of placing the pail with its contents on or close to the highway would be to endanger persons lawfully using the highway, notwithstanding that the accidental act of a third person, who knocked against the pail, was a necessary element in causing the injury. The judgment quotes from *Latham v. Johnson*, [1913] 1 K.B. 398, at p. 413 the following, as stating the principle:

“No doubt each intervener is a *causa sine qua non*, but unless the intervention is a fresh, independent cause, the person guilty of the original negligence will still be the effective cause, if he ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his negligence would lead to mischief.”

I refer also to *Bliss v. Boeckh* (1885), 8 O.R. 451. In that case the defendant had erected a beam from which to hang gates across a lane which was commonly used for public travel. There was no complaint of the presence of the gates, but the beam was

only nine and a half feet from the ground. The plaintiff was driving a loaded wagon in the lane, and there was at the time on the ground below the beam an accumulation of rubbish with ice and snow, which raised up the front wheels of the wagon. The plaintiff's attention being fully occupied in getting his loaded wagon through the narrow lane, he did not notice this and came in contact with the beam, injuring his neck and shoulders. The defendant contended that the cause of the accident was the accumulation of rubbish and ice and snow, for which he was not responsible, but it was held that there were two causes of the injuries and that the defendant was liable for his negligence in having placed the beam too low, although the person responsible for the presence of the rubbish on the ground might also be liable.

I think the principle of these cases is applicable here, and that the appellant is liable even if there were no negligence on the part of anyone in the presence of the ice on the sidewalk. It is conceivable that the respondent may have fallen so soon after the icy surface had formed that appellant had not time to protect it, but this is a condition that appellant was in duty bound to contemplate when it assumed the responsibility of maintaining this sidewalk with an excessive slope.

As this failure to keep the sidewalk in repair in the one respect is sufficient to support the judgment even if there were no negligence whatever in respect of its icy covering, as might be the case if the ice had formed quickly or was due to some third person putting water on the sidewalk, I do not think subsec. 3 of sec. 480 of the Municipal Act applies and exempts appellant except in case of gross negligence. The presence of a second cause should not have the effect of exempting appellant from liability for its negligence in regard to the first. If, however, any such effect should be attributed to the language of subsec. 3, I would hold that there was gross negligence here on the part of the municipality in maintaining a sidewalk with the excessive slope from side to side that was present here over so long a time. The state of things existing on the evening of this accident must have existed on many occasions. It is true there is no account of other damage claims arising in connection with the sidewalk and respondent said that he had no knowledge of anyone ever having fallen upon it and being injured, but that does not prove that the sidewalk was kept in repair. Most persons are fortunate enough

to cross even dangerously slippery places without falling, and of those who fall but few are injured. If it were not so, the municipalities that from time to time are found grossly negligent and liable for damages to some unfortunate pedestrian would be submerged with damage claims, for many persons will have travelled the same way.

The only other question to consider is appellant's claim that respondent was himself negligent. The trial Judge has found against this contention, and I think he was right. It is a difficult defence for a municipality to make out. It does not attract instant sympathy for it appears to be based upon a confession of negligence on the part of the municipality so gross that it was obvious to anyone. Neither does it fit well with certain evidence given by witnesses called for appellant who thought conditions were not difficult for pedestrians, nor with the admission extracted by appellant's counsel from some of respondent's witnesses that with care they had successfully passed over the icy sidewalk. Many persons did, indeed, walk safely where respondent fell. Respondent himself made progress for a time without falling, and there is nothing to indicate that he was less careful at the moment he fell. He was only doing what many other persons were doing, and what the existence of the sidewalk invited him to do. If he had gone upon the roadway, as it is suggested he should have done, he would have been in danger from motor traffic, and if he had been injured by it, it is highly improbable that the municipality would have accepted any responsibility on the ground that he had been forced by the non-repair of the sidewalk to take the risk of walking along the road. Respondent had a reasonable expectation of passing the dangerous place in safety as many others were doing, and it was not negligent on his part to continue on his way. The fact that he fell when others did not fall is not evidence of negligence on his part, and there is ample evidence that he was walking with great care.

There are numerous cases on the question of contributory negligence in these sidewalk accidents. *Gordon v. City of Belleville* (1888), 15 O.R. 26, is a leading case in this Province. That case and others are referred to in *Keech v. Town of Smiths Falls* (1907), 15 O.L.R. 300.

In the result the appeal should be dismissed with costs.

GILLANDERS J.A.:—The facts of this case are set out in the judgment of Mr. Justice Fisher. If no question arose in this case other than the presence of ice and snow on the sidewalk, the condition of which was otherwise not criticized, I would be clearly of opinion that no liability rested on the defendant corporation.

Owing to mild weather conditions, there was no object in putting sand on the walk during the day of the accident until 5.00 or 5.30 p.m. As found by the learned trial Judge, "The best finding I can make on the evidence is that not before 5 o'clock but probably by half-past five owing to a drop in the temperature a surface had again been produced on the sidewalk which would lend itself to sanding to the benefit of pedestrians."

If there was no alleged element of non-repair other than the ice and snow, I would think no gross negligence was shown in failure to have sanded the walk before the plaintiff fell. Sanding had been done the night before and earlier on the day of the accident. However, the sloping condition of the walk from side to side is an element of importance. Whether it had originally been so constructed, or whether, by reason of the nature of the ground by which it was supported and the action of frost, the sloping condition had subsequently developed, is not of importance. It had been in the condition it was on the day of the accident for some years, and the defendant municipality had constructive notice of this condition. The sloping from side to side where the plaintiff fell was, as the trial Judge finds, one and one-fifth inches per foot as against a maximum allowed by standard engineering practice for drainage purposes of three-quarters of an inch per foot. While under some weather conditions the evidence indicates that the walk would not constitute a hazard to pedestrians using reasonable care, I accept the finding of the trial Judge "that upon the situation being aggravated by rain or snow this particular portion of sidewalk became dangerous to pedestrian traffic."

The defendant attributes his fall both to the slope and the ice. See evidence, pages 41-2:—

"Q. Mr. Fogg, what would you say was the cause of your fall? A. Well, the sidewalk for one thing, and the ice the second thing.

“Q. When you say ‘the sidewalk for one thing’ what do you mean? A. The slope of it. You have no chance to get a foothold.”

In the recent case of *Smith v. Winnipeg*, [1939] 1 D.L.R. 397, in Manitoba, where the liability imposed on municipalities in such cases as the present is similar, although not stated in the same words, the plaintiff fell and was injured by slipping on a sidewalk which had been constructed slanting down toward the centre of the street and rendered icy by recent frost. It was held by Mr. Justice Taylor that mere failure to sand during a thaw while water was still on the surface, and before it had a reasonable opportunity to do so after frost, puts no liability on the municipality; but a slant in the walk due to faulty construction, dangerous when icy or slippery, and known by the municipality to be so, is negligence for which the municipality is liable when a pedestrian is injured by falling thereon.

Under all the circumstances here, with some hesitation I am in agreement with the view of the learned trial Judge that the slanting condition of the walk where the plaintiff fell constituted non-repair, and that this condition of non-repair was one of the causes of the accident.

It has been urged that in many cases of hills and rises the longitudinal grade of the walk is, owing to natural conditions, steeper than the sideways slant in this case. Each case must be considered on its own particular facts and circumstances. But I am inclined to think that a condition such as existed here where there is a slant in the walk from side to side of long standing, under circumstances where there is nothing to prevent the municipality remedying such a situation, is hardly comparable to the longitudinal rise and fall of a walk due to conditions which it is not reasonable to expect the corporation to substantially change.

It is contended that the plaintiff was guilty of contributory negligence; and the attention of the Court is called to the plaintiff's evidence that he knew the walk was covered with ice before he came to the place where he fell; that people on the walk ahead of him were having difficulty; that he proceeded along for a time slipping and sliding before reaching the place of the accident; that he knew the slope; that it was getting worse as he proceeded, and there was no sand on it; and that, although he knew it was dangerous, he kept on going.

It has been held that *volenti non fit injuria* does not apply as a defence where damages flow from a breach of an absolute statutory duty: *Baddeley v. Earl of Grenville*, 19 Q.B.D. 423; *Greer v. Township of Mulmur* (1926), 59 O.L.R. 259; but under proper circumstances the plaintiff may be guilty of contributory negligence.

The question is discussed in *Gordon v. City of Belleville* (1888), 15 O.R. 26, where Chief Justice Armour says, in part, at p. 29:

"The law here provides that every public road, street, bridge, and highway, shall be kept in repair by the corporation, and on default of the corporation so to keep in repair, the corporation shall be civilly responsible for all damages sustained by any person by reason of such default.

"I do not think that we ought to enable corporations to evade their plain duty by reading into this enactment a proviso that they are not to be civilly responsible to any person who uses such road, street, bridge, and highway, knowing that they have neglected their duty, and have not kept them in repair. It would lead to this absurdity that the more the corporation neglected its duty, the more the road was out of repair, and the longer it continued so, the more it would become known and the greater would become the number of those requiring to use it who would know its condition, and the fewer would become the number of those requiring to use it who would not know its condition; and so the more it was out of repair and the longer it continued so, and the greater the neglect of the corporation, the less would be its responsibility, for it would be to fewer people.

"The public have the right to use every public road, street, bridge, and highway whether in or out of repair and it is the duty of the corporation to keep them in repair.

"Every person is entitled to use them, assuming that the corporation has performed its duty, and has kept them in repair, and the care he will be required to exercise will be commensurate with that assumption. If, however, he knows that they are not in repair, he will still be entitled to use them, but the care he will be required to exercise must be commensurate with his knowledge of their condition; he will be required to exercise such care as a prudent man would reasonably exercise in using them knowing their condition

"In the case in hand, the plaintiff was entitled to use the sidewalk, although he knew its condition, but in so using it, he was bound to use such care as a prudent person would reasonably exercise in using it knowing its condition."

Some ten years prior to the decision in *Gordon v. Belleville* (*supra*) the question was discussed in *Burns v. The City of Toronto* (1878), 42 U.C.R. 560, where the female plaintiff while walking over a sidewalk in broad daylight slipped on the ice, fell, and was injured. It was proved that she was well aware of the state of the walk, as she lived close by, frequently passed over it, and had already passed over it on the day of the accident. Chief Justice Harrison, being of opinion that the plaintiff was guilty of contributory negligence, says, in part, at p. 574:

"If the defect in the highway was such that a person of ordinary care and prudence having knowledge of the defect would not, under ordinary circumstances, have attempted to pass over it at her own risk, the female plaintiff had no right to try the experiment otherwise than at her own risk, and certainly not at the risk of the city corporation." The other two members of the Court, while reaching the same result in the case, were apparently not prepared to go as far as the remarks of the Chief Justice indicated on the question of contributory negligence.

Our attention is called to *obiter* remarks of this Court in *Leeson v. Havelock*, [1940] O.W.N. 289. I think the facts in the above case are to be somewhat distinguished from the case at bar. In the *Leeson* case the plaintiff, who had been walking on a clean bare sidewalk, came to a place where an icy condition existed for only some 40 to 50 feet. It was in broad daylight, not at night, and it was possible to see exactly where one stepped. The walk was not raised above the level of the adjacent boulevard as here, nor was the walk in a slanting condition. In the case at bar it appears that, while the plaintiff appreciated the fact that the walk was slippery, he was exercising considerable care in proceeding; he could not conveniently step off the walk owing to the fact that it was considerably raised from the adjacent ground. He was endeavouring to get from the outside of the walk toward the centre when he met with the accident. The walk was slippery, and slanting both in front and behind, and more than a foot from the ground level without any railings. In his case there was probably little more he could have done when

he appreciated the condition and attempted to get away from the edge towards the centre. Furthermore, the trial Judge has found as a fact that he was not guilty of contributory negligence, and with that I am not prepared to disagree.

The statement of claim in the action originally pleaded in paragraph 5 thereof that the "fall of the plaintiff was due solely to the icy and slippery condition of the said highway and to the gross negligence of the defendant in failing to keep the said highway in a proper state of repair and in permitting an accumulation of ice and/or ice and snow to remain upon the said highway." The learned trial Judge, although of opinion that the allegation was broad enough to cover the non-repair which he found to exist, in giving judgment *ex mero motu* (so far as the record shows) gave leave to the plaintiff to amend, if so advised, by pleading general non-repair of the walk at the point where the accident occurred. In pursuance of this the plaintiff amended. Objection was taken to this amendment as permitting a new cause of action to be set up at a time when it was barred by section 480(2) of The Municipal Act, and we were referred to *Ellis v. Pelton*, [1933] O.W.N. 191. No objection was taken during the trial to the evidence adduced respecting the slanting condition of the walk, and under the circumstances I think the original pleading, while scanty, was sufficient and that the amendment did not permit the setting up of a new and separate cause of action.

The appeal should be dismissed with costs.

FISHER J.A. (dissenting):—This is an appeal by the defendant from the judgment of Greene J., arising out of an action brought to recover damages for personal injuries sustained by the plaintiff slipping and falling on a sidewalk in the Town of Kenora.

The plaintiff alleged in paragraph 5 of the statement of claim that the accident was "due solely to the icy and slippery condition of the highway and to the gross negligence of the defendant in failing to keep the said highway in proper state of repair and in permitting an accumulation of ice and/or ice and snow to remain upon the said highway."

The learned trial Judge being in doubt at the conclusion of the trial whether the claim set out in paragraph 6 included

a state of non-repair, granted the following amendment to the statement of claim:—

“(4) (a) The plaintiff alleges that the said sidewalk at the point of the aforesaid accident was at the time of the said accident in a serious state of non-repair.”

In awarding the plaintiff \$4,000 damages, the learned trial Judge based the liability of the defendants entirely upon the allegation set out in the amended pleading, and in his reasons found that “the sidewalk at the scene of the accident was seriously out of repair caused by defective construction in that there was a drop from side to side in the sidewalk at the rate of one and one-fifth inches per foot,” and also that “even without moisture or snow or ice on the surface of the sidewalk, the situation being aggravated by rain or snow, that this particular part of the sidewalk immediately became dangerous to pedestrian traffic.” The learned Judge did not find gross negligence in regard to the snow and ice, but left that finding to a Court of Appeal if it was determined by that Court that he was wrong in his finding on the question of non-repair by defective construction.

One of the contentions of the defendant at the trial was that, even if the defendant was guilty of negligence, the plaintiff was guilty of contributory negligence. That contention the learned trial Judge dismissed, and I agree with his conclusion.

The two questions arising for determination are: (1) was there serious non-repair caused by defective construction, as found at the trial and (2) was there gross negligence because of the icy condition of the sidewalk?

In dealing with the first question, I am, with the greatest respect, unable to find any liability on the part of the defendant. The relevant facts must be stated.

The plaintiff and several hundred citizens had been at the railway station on Sunday evening, December 17, 1939, to see a train containing military troops arrive. The plaintiff, on his way back to where he lived, proceeded southerly on the east side of Chipman Street and came to a point where the sidewalk sloped from the east to the west, and at about 9 p.m. there fell and was injured. The slope commenced near the spur of the railway tracks and continued until it reached the point where the plaintiff fell.

The plaintiff stated that the slope, as he proceeded southerly, became more pronounced. As to the condition of the weather, and the sidewalk, he swore as follows:—

(p. 35, line 24) "It was not freezing, and it was not slushy. It was in between that, and I call it soft." (At p. 36, line 33). "It was not bad until we hit where she started to slope." "The walking was very slippery, and I noticed several pedestrians walking with difficulty ahead of me." (Line 40, p. 24): that the sidewalk was covered with glare ice; that there was no sand. And at p. 41, line 12: "Walking on that sidewalk was like walking on the side of a hill." (Line 12, p. 47) "that the snow on the surface of the sidewalk was not icy but was hard." (p. 47, line 23) "I didn't notice whether there was much snow or accumulation of ice and snow on the sidewalk." "During the forty-five minutes I was at the station the weather was stiffening or freezing. It was foggy when I was at the station. On the way from the station, and before I fell, I noticed there were probably about fifty people ahead of me walking on the sidewalk, and I noticed they had considerable difficulty in maintaining their footing." That for about 60 feet before the accident happened "I knew that the sidewalk under foot was extremely dangerous." (At line 23, p. 53) the plaintiff swore that "there is about 70 or 80 feet of slope" before he came to the place he fell. That there were about two or three hundred people following behind him and some of them were walking on the sidewalk and some on the road;" that he had lived in Kenora for fourteen years, and had never heard of anybody having fallen and been injured on the sidewalk where he fell, and during that time he had passed and re-passed this particular place many times, and that he knows the sidewalk was in the same condition during all these years. (at p. 54, line 32):

"Q. Now then, Mr. Fogg, would you say to-day that that sidewalk without ice is dangerous? A. Well, if there is no ice on it, I guess you could walk on that sidewalk."

At p. 55, line 11:

"Q. You will say that without ice and without rain that there was no danger on that sidewalk? A. Well I would not say there was."

At p. 55, line 30:

"Q. You would not be able to slip on sand would you? A. In a case like that, I would say yes. You would if it was not heavy

sand because you are walking on the side of the hill," and that his slipping was due to ice and the sidewalk, both combined.

Mr. Young, an officer in charge of the airport meteorological service, swore that the temperature from morning to evening of the 17th December was at 9.30 28 deg., at 10.30 29 deg., at 11.30 30 deg., at 12.30 31 deg., at 1.30 32 deg., at 2.30 32 deg., and at 4.30 and 5.30 31 deg., at 6.30 it was 30 deg., at 7.30 30 deg., and at 8.30 and 9.30 it was 29 deg. That his observations of the weather throughout the 17th were "that it was overcast and a light fog throughout the day."

Dickson, a resident of Kenora and the metre man at the Kenora Paper Mills, whose duty was to make reports respecting the weather, swore "that on the 17th there was a slight mist, or drizzling rain, that there was slight freezing, and it was getting slippery about 4.30 p.m." This witness, who was called by the plaintiffs swore (p. 32, line 2) :

"Q. If a person walking along that street and realizing that it was slippery that night, and if they used ordinary care, the ordinary care you used that night, they would have been alright, wouldn't they? A. I think they would have."

William Maynard, a witness called on behalf of the plaintiff (at p. 128, line 9) swore "that it was mild through the day (the 17th) up until about 5 or 6 o'clock."

Hart, also a witness called by the plaintiff, (at p. 88, line 10) swore:

"Q. In other words it was so mild at 4 o'clock that water was lying on top of the ice so that it was wet? A. It was wet, yes." (Line 15, p. 88): "It was so mild that there was a film of water lying on top of the ice? A. Yes." That there had been snow during the previous twenty-four hours; that it had melted and became moist, and at 6 p.m. the temperature was practically the same, and that "when I was at the station waiting for the troop train, I noticed water was dropping off the roof of the station while I was standing there."

In dealing with the sanding of the street, the evidence establishes that on the 16th December three men were employed by the defendant municipality to sand the streets. Slips put in (Ex. 11) show the hours these men were employed in sanding on that day. On the 17th (Sunday) five men were employed, and the slips (Ex. 12) show the hours employed in sanding the sidewalks on that day. The evidence to my mind is conclusive

that this particular sidewalk, at the place where the plaintiff fell, was sanded on the 16th and on the morning of the 17th sometime between 8 a.m. and 9 a.m.

In dealing with the construction of the sidewalk, the engineers called by both litigants agree that the drop from side to side was at the rate of one and one-fifth inches per foot. The defendant's witness engineer Green, swore that an 11-inch drop in a sidewalk would be dangerous to pedestrians *if covered with slippery ice and not sanded*. Green swore that on Saturday he informed the foreman Johnson that three troop trains were coming in on Sunday evening and there would be a great number of people going to the station. He gave instructions that all the sidewalks, and particularly those leading to the station, be sanded; that he saw men sanding the street Saturday night, and orders were given to sand on Sunday; that he saw the men working on Sunday morning, and that he made some inspections Sunday afternoon, including Chipman Street; that the defendant in sanding the street used sand with a mixture of calcium chloride in the following proportions: Green swore that "We start off using 50 pounds, which later is increased to 75 pounds, then it is mixed at 75 pounds per cubic yard," and that the purpose of the calcium chloride was to bed the sand into hard packed snow and ice. In dealing with the slant of the sidewalk this witness swore that there was no such thing as a standard sidewalk, because they have to be built to conform to the topography of the municipality; that he had discovered the ground condition where this slant took place in the sidewalk was that of muskeg; that he made a test in getting to the bottom at that particular part some time after the accident, and had sunk a test hole by putting down a drill steel 32 feet long just south of the accident, and "we did not touch bottom at all." "It was all soft muskeg for 32 feet."

I do not find any evidence that the sidewalk was at its inception constructed with the slant as found at the time the plaintiff fell; and I think the reasonable inference is that, because of climatic conditions and the ground thereunder being of a muskeg condition, the sidewalk became disturbed and the slant followed. As I understand the law as laid down in a long line of cases, all that is required of a municipality is that they must keep their sidewalks and streets in such a state of repair that they will be

reasonably safe for those using them, if they exercise reasonable care.

The first question is, Was this sidewalk in that condition?

In answer to that question, the first observation I desire to make is that it must have been reasonably safe because of the fact that thousands of pedestrians—including the plaintiff—had passed and re-passed over it for about 14 years, and there is no record of anyone being injured by falling; and also because of the fact that on the plaintiff's own evidence, he swore that pedestrians immediately ahead of him, and hundreds of pedestrians immediately following, passed over this sidewalk without mishap on the night of the 17th December at about 9 p.m.

These facts are, of course, not conclusive, but, in my view, afford strong evidence in support of the contention that the sidewalk was reasonably safe for pedestrian traffic. In this connection I refer to the evidence of Dickson, a witness called by the plaintiff. (At p. 31) This witness appears to have been out for a walk, and intended going to the station but, finding that the walking was rather dangerous, determined not to go. (At p. 31, line 25) he swore:

"Q. That dangerous walking applied to all over the town?

A. Yes sir.

"Q. That is what you meant? A. Yes.

"Q. The walking in general that night was dangerous? A. Yes sir."

Several of the witnesses called for the plaintiff and defendant have sworn that if this particular section of the sidewalk was free of slippery ice it would be reasonably safe for pedestrians exercising reasonable care, but dangerous to pedestrians if there was slippery ice upon it.

My conclusion is that this accident was not due to faulty construction of the sidewalk, as found by the trial Judge.

The next question is, Was the sidewalk dangerous to pedestrian traffic because of its slippery condition due to the presence of ice, and, if so, did the defendant do all that was reasonably required of them to safeguard pedestrians? If they did, gross negligence, of course, cannot be found. The evidence is that the sidewalk where the plaintiff fell was sanded on Saturday the 16th, and again on Sunday the 17th, at about 9 a.m., and that the weather on that day remained comparatively mild until about 5 p.m., and at about that time slight freezing set in and

no doubt from that time on the freezing would become more pronounced, and the surface of the sidewalks become slippery.

The question is: Were the defendants guilty of gross negligence because they did not sand from the time it commenced to freeze at 5 p.m. and before the plaintiff fell at about 9 p.m.? I am strongly of the opinion that they were not. My reasons are: From the time this sidewalk was sanded in the morning of the 17th the weather, according to the evidence, continued comparatively mild, and at about between 5 and 6 o'clock that afternoon there were signs of slight freezing, and because of that fact it would ordinarily take some little time before the streets would become slippery; and, even admitting that at about 7 p.m. the sidewalks and streets would become more slippery, would it not be imposing an intolerable and next to an impossible task for the municipality to have sanded the streets before 9 p.m.? But, apart from that fact, the conditions of the weather at about 6 p.m. could not have been so alarming because it was known by those having in charge the sanding operations that this sidewalk had been sanded during that morning. To tie a municipality down to an obligation to sand as soon as some slight change in the temperature appeared, would necessitate the employment of a person to keep watch night and day for changes in temperature and to report the moment a change to colder weather appeared; and that, too, would, of course, call for men to be on hand day and night. Such obligations are something akin to the duties of a municipal fire brigade. If, for example, the streets were free from danger because of slippery ice at 11 p.m., but freezing thereafter set in and slippery streets appeared, and pedestrians who work part of the night were returning home at 1 a.m.—and they are entitled to the same protection as pedestrians using the streets at 9 p.m.—fell and were injured, can it reasonably be said if the streets were not before that time sanded the municipality would be guilty of gross negligence? I think not.

Gross negligence does not arise, and the Legislature never intended, and its enactment does not, in my opinion, mean that almost immediately after a freezing temperature appears sanding operations must commence.

The evidence, to my mind, is conclusive that this municipality was giving careful attention and making all reasonable efforts to discharge its duties insofar as sanding operations were con-

cerned. No one disputes the fact that a sloping sidewalk with slippery ice thereon is a place of danger and requires careful supervision, but there are many reported cases where pedestrians fell on level sidewalks when covered with slippery ice. I do not see much, if any, difference between slippery ice on a sloping sidewalk and slippery ice on a naturally declining sidewalk where pedestrians would be liable to fall. In such cases all that is required of the municipality is that it exercise ordinary care and diligence to safeguard pedestrians.

At the risk of repeating, this sloping sidewalk was well known to the plaintiff—he had been over it for years. He admits he knew that it was dangerous that night because of ice, and before he fell; a great number of pedestrians walking ahead of him, and hundreds of pedestrians behind him, passed over this sidewalk with safety; and it does seem strange if the plaintiff was exercising ordinary care, that he did not also pass over in safety. Everyone who ventures out on sidewalks covered with slippery ice must accept all the inevitable consequences; and unless gross negligence is found, the municipality is not liable if someone is injured by falling.

The question in all cases like the one at bar is one of fact, and must be determined by the application of sound common sense to the evidence.

My conclusions are that the plaintiff's accident was not due to faulty construction of the sidewalk but to the plaintiff slipping and falling on ice on the sidewalk, which I find the defendant took all reasonable precautions to safeguard. Such cases as *Harper v. Prescott*, [1939] O.W.N 492, affirmed on appeal in the Supreme Court of Canada, not yet reported, *Huycke v. Cobourg*, [1937] O.R. 689, and *Burgess v. Southampton*, [1933] O.R. 279, are of assistance in supporting these conclusions.

I would allow the appeal with costs and dismiss the action with costs.

Appeal dismissed with costs, FISHER J.A. dissenting.

[COURT OF APPEAL.]

Storry v. The Canadian National Railway Company.

Negligence—Railways—Accident at highway level crossing—Plaintiff's automobile stalled on crossing—Attempts by plaintiff to shove car from track—Negligence of plaintiff.

The plaintiff brought this action to recover damages for personal injuries and for the destruction of his automobile and at the trial before McFarland J., with a jury, McFarland J. on the completion of the evidence granted the defendant's motion for a non-suit and dismissed the action. The plaintiff appealed to the Court of Appeal.

Held by the Court of Appeal, on the evidence, that the action was properly dismissed as to the plaintiff's claim for personal injuries, but that the question of the liability of the defendant for the destruction of the plaintiff's automobile should have been left to the jury.

The facts as disclosed in the evidence showed that the plaintiff had stalled his automobile on the track of the defendant company at a highway level crossing, and while the train of the defendant company was approaching the plaintiff attempted to shove his automobile off the track. When the plaintiff realized that he could not save his automobile from destruction by the approaching train he stepped off the track and ran forward to a signal post where he fell and at that moment his motor car, which was struck and thrown forward by the engine, crashed into the signal post and crushed the plaintiff's arm. The sole effective cause of the plaintiff's personal injury was his own negligence and he was guilty of a continuous series of negligent acts leading up to the injury to his arm. The plaintiff by his own incompetence or by the defective condition of his motor car stalled it on the railway track; having stalled his motor he made a futile attempt to remove it by standing on the track and attempting to shove it forward; the plaintiff, although he realized from the warning whistles of the locomotive that the train was not stopping, chose to remain in that situation of danger until the train was within 65 or 70 feet, and then instead of stepping 4 or 5 feet eastward off the track into a place of safety, he went north-easterly to the very point to which his motor car was most likely to be carried when the train hit it. Therefore, the plaintiff's claim for personal injuries was properly dismissed by the trial Judge.

As to the claim with respect to the automobile, although the plaintiff was to blame for its position on the railway crossing, once it was there, unlike himself, it could not be got out of the way of the approaching train, and the plaintiff was entitled to the verdict of a jury on the questions whether the train could have been stopped or whether it ought to have been stopped before it reached the crossing.

AN appeal by the plaintiff from a judgment of McFarland J. dismissing the action.

January 24th and 25th, 1940. The appeal was heard by ROBERTSON C.J.O., MASTEN and HENDERSON JJ.A.

R. R. McMurtry and H. A. C. Breuls, for the plaintiff, appellant.

R. E. Laidlaw, K.C., and A. E. Macdonald, for the defendant, respondent.

February 19th, 1940. ROBERTSON C.J.O.:—This is an appeal from the judgment of McFarland J., dated 9th November, 1939, dismissing the action with costs on the trial before him with a jury at Toronto. At the close of the plaintiff's case, counsel for the defendant moved for a non-suit and judgment on the motion was then reserved. On the completion of the evidence and before the case went to the jury the motion was renewed, and was granted.

The action is to recover damages for personal injuries to the plaintiff and for injury to his motor-car in an accident at a railway crossing in the village of Stouffville.

The plaintiff is a farmer living two or three miles out of Stouffville. On 29th November, 1938, at about 10 o'clock in the morning he drove to Stouffville in his motor-car, entering the village from the west on Main Street. This is a paved street running approximately east and west and it crosses, almost at a right angle, defendant's line of railway from Toronto to Lindsay. As one comes along Main Street to this crossing from the west there is first a local railway siding, then a vacant strip of land 9 feet wide, and then the single track through railway line. Both the siding and the through line are planked on the crossing while the 9-foot space between them is filled in with cinders to about the same level. The crossing is protected under order of The Board of Railway Commissioners by two "wig-wag" signals, one near the south-west corner of the crossing and the other near the north-east corner. There are also the usual crossing sign-boards. The plaintiff was familiar with the crossing and there were no unusual conditions on this occasion interfering with his view.

As the plaintiff, driving easterly, approached the crossing at a speed of from 8 to 10 miles per hour, he heard the whistle of a locomotive coming from the south. He at once applied his brakes, and he says he put them on "pretty full." He was then to the south of the centre line of the paved roadway and about 30 feet west of the westerly rail of the local siding. It would appear that if his car had been equipped with useful brakes, it would, if going no more than 10 miles per hour, have been brought to a stop almost at once, and before it even entered upon the crossing. That is not what happened. When plaintiff applied his brakes his engine stalled and he did not get it started again. The motor-car, however, continued on its

way, 30 feet to the siding, across the siding, across the 9-foot strip and on to the main line. There it stopped, with the front wheels east of the easterly rail of the main line and the rear wheels at or near that rail.

At the time plaintiff heard the engine whistle, his view of the railway tracks to the south was obstructed by a building and a hedge, and he did not look for the train until his car had stopped. He then saw that the train was still 1,000 feet or more away, and fearing that he might be caught by the train if he remained in his car to start his engine, he alighted, and thought he might be able to push his car off the track. He first went to the back of the car, and with his hands waved a signal to the train to stop. Then, turning to his car, he tried to push it ahead but could not move it, and he observed that one of its rear wheels was in a slight depression between the rail and the planking. "Then," to use his own words, "the train was coming and it was tooting for me to get off." He still took time to again signal the train to stop, and "ran for safety." The plaintiff says that the on-coming train was then only 65 to 70 feet from him, and he estimated its speed at 40 miles per hour. He thought he would be safe behind the standard or post of the "wig-wag" signal on the north-east corner of the crossing, some 27 feet away and about 10 feet east of the railway track. To get off the track and out of the way of the train was readily accomplished, but when near the signal post he slipped and fell. As he fell he threw his arms around the post to save himself and at that moment his motor-car, being struck and thrown forward by the engine, crashed into the standard and caught and crushed his arm. It was so badly injured that amputation was necessary.

Many grounds were advanced on behalf of the plaintiff in support of his claim that the defendant is responsible both for his personal injuries and for the damage to his motor-car. It is argued that the defendant did not give proper warning that its train was approaching the crossing, and in particular it was said that the "wig-wag" signal was not operating. In my opinion the whole matter of the warning that the plaintiff had of the approach of a train before he reached the crossing is set at rest by his own admissions. He heard the engine whistle and knew at once that a train was coming from the south, and he put on his brakes to stop his car. The engine

whistled at what is called the "whistling post," 80 rods, or more than 1,300 feet south of the crossing. The signal-box at which an approaching train sets the "wig-wag" signal in operation, is only 1,065 feet south of the crossing. This is close to the position the engine had reached according to the plaintiff, when he looked and saw it, on his motor-car coming to a stop. He had an earlier warning from the engine's whistle that the train was coming, and he acted upon it, and it would seem to be a matter of no importance whatsoever whether or not he had also a warning from the crossing signals. It is not to be taken that the evidence would warrant a finding that the crossing signals failed to operate as and when they should. It is also quite plain that the plaintiff never looked for these signals.

For the situation in which he found himself on the railway crossing, with his stalled motor-car, and an on-coming train 1,000 feet away, the plaintiff was alone responsible. There can be no doubt that he then fully realized the risks of his position and his duty to avoid them. While not in instant danger, his danger was sufficiently imminent that he did not dare to remain in his car to try to start it, for fear he might be caught. He therefore alighted and contented himself with an effort to push his car, and it was no matter of surprise to him when the train drew rapidly nearer and he was forced to leave. He was in fact not left without further warning for, in a moment or two after turning to his motor-car to try to push it, he had a fresh reminder of his danger in the continued short sharp whistling of the engine which he correctly understood as a signal to him to get off the track. He had still time to escape and he did escape the danger that threatened him. Quite unnecessarily, however, he created for himself a new danger. When he might quite obviously and more quickly have found safety in less than half the distance by simply going either to the east or to the west, he stupidly ran ahead of the engine to the signal post. He says that even then he would have been safe if he had not slipped, but that unlooked for accident cannot in any way be attributed to the Railway Company.

This is not a case where the plaintiff can plead an unexpected emergency where he was put in such instant danger that he had no time to think and was panic-stricken. Even if such a plea is ever open to one who himself is responsible for the emergency, it is plain from the plaintiff's own evidence that he was not

panic-stricken, but was able to consider his position and decide upon his conduct. There are a number of instances of it. His decision not to remain in his car and try to start his engine; his observation of what it was that held the wheel of his motor-car so that he could not push it; his understanding of the significance of the warning whistles as the train drew nearer; his final signal to the engineer as he abandoned his motor-car; even his choosing—for he says he thought about it—of a place for safety, all indicate that he did not act in panic or on impulse and without thought. It is true his choice in the end of a place for safety was not a good one, but that is not because he had no time to think. In fact he still defends it and lays his injury wholly to his accidental fall as he reached the signal-post.

So far as the plaintiff's personal injuries are concerned, I am of the opinion that there is no evidence that the defendant was the cause of them, but on the contrary I am of the opinion that the plaintiff was himself the sole cause.

With respect to the damage to the motor-car, it may be that the plaintiff was entitled to have the verdict of a jury. Doubtless the plaintiff was to blame for its position on the railway crossing, but once it was there, unlike himself, it could not be got out of the way of the approaching train. The plaintiff may be entitled to the verdict of a jury on the questions whether the train could have been stopped, and whether it ought to have been stopped before it reached the crossing. Obviously it will be of no great advantage to the plaintiff, considering the small amount of his claim in respect of his motor-car, to have the chance of a new trial in this action in the Supreme Court of Ontario, limited to that claim, but if he desires it, taking the risk as to costs, he may be given that opportunity. The plaintiff should give notice in writing within two weeks from the date of this judgment whether he so elects. If the plaintiff does not so elect, the appeal will simply be dismissed with costs. If the plaintiff elects to have a new trial, limited as stated, the appeal as to his claim for damages for personal injuries will be dismissed, and as to his claim for damages to his motor-car the appeal will be allowed and a new trial ordered. The defendant is entitled to its costs of appeal in either case, and to its costs of the action down to and including the trial.

HENDERSON J.A. agreed with Robertson C.J.O.

MASTEN J.A.:—This is an appeal from the judgment of McFarland J. dated the 9th November, 1939, dismissing the plaintiff's action.

Agreeing as I do with the conclusion of my Lord the Chief Justice that the non-suit insofar as it relates to the claims for damage to plaintiff's motor must be set aside and a new trial directed, I refrain from expressing any opinion on the plaintiff's allegation that the defendant was guilty of negligence.

But even assuming that the defendant was negligent, I am clearly of opinion that such negligence was not an effective or contributing cause to the injury of the plaintiff's person.

In my view the sole effective cause of the plaintiff's injury was his own negligence and failure to use reasonable care on his own part for his own safety. He was guilty of a continuous series of negligent acts leading up immediately to the accident to his arm. He brought on the highway a dangerous machine and by his own incompetence or by the defective condition of his motor-car stalled it on the railway track. Having stalled his motor on the railway track he made a futile attempt to remove it by standing on the railway track behind the car and trying to push it forward. Though fully aware of the oncoming train he chose to remain in that situation of danger until the train was within 65 or 70 feet of him (see evidence p. 50), and then instead of stepping four or five feet eastward off the track into a place of safety he went north-easterly across the railway track 24 feet to the spot to which the motor-car was most likely to be carried when the train hit it. Out of this succession of imprudent and negligent acts, that which seems to me to manifest the grossest breach of the plaintiff's duty to use reasonable care for his own safety is his remaining on the railway track until the oncoming train was within 65 or 70 feet of him. His subsequent foolish action may have been the result of terror and loss of nerve, but, if so, he himself created the situation by remaining so long in the path of obvious danger. I am unable to reach any other conclusion than that the immediate and direct cause of his injury was his negligent breach of duty in failing to use reasonable care for his own safety.

*Subject to right of plaintiff to elect to have a new trial as to his claim with respect to his automobile, appeal dismissed with costs.**

[COURT OF APPEAL.]

Rex v. Buck et al.

Criminal law—Evidence—Charge of manslaughter—Illegal operation—Admissibility of a dying declaration made by victim—Settled, hopeless expectation of impending death—Admissibility limited to statements as to cause of death.

The admissibility of a dying declaration is limited by the following considerations:

- (a) A dying declaration to be admissible as such must have been made when the declarant had a settled, hopeless expectation of impending death.
- (b) No statement can be admitted in evidence as a dying declaration that the person making the declaration could not give in evidence in the witness box if living.
- (b) A dying declaration is only admissible when the death of the deceased is the subject of the charge against the accused and the circumstances of the death are the subject of the dying declaration; or as put by Baron Alderson in *Ashton's Case* (1837), 2 Lewin 147, "declarations as to the cause of death" are what may be given in evidence by way of a dying declaration.

Hence in the present case that portion of the dying declaration of the victim which referred to an attempt by the accused to cause an abortion, made weeks before the commission of the offence charged, an attempt that was both ineffectual and harmless, was not admissible since it did not come within the description of a statement of the circumstances of the death or a declaration as to the cause of death.

AN appeal by Margaret Buck and Benjamin Buck from their conviction on a charge of manslaughter by Hope J. and a jury.

November 1st and 2nd, 1940. The appeal was heard by ROBERTSON C.J.O., MIDDLETON and MASTEN JJ.A.

H. F. Parkinson, K.C., for the accused, appellants.

C. R. Magone, K.C., for the Crown.

November 14th, 1940. The judgment of the Court was delivered by ROBERTSON C.J.O.:—This is an appeal from the conviction of appellants, who are husband and wife, on a charge of manslaughter on their trial before Hope J. and a jury at Toronto.

*The plaintiff subsequently appealed to the Supreme Court of Canada and by judgment dated June 29th, 1940, the Supreme Court of Canada allowed the plaintiff's appeal and ordered a new trial of the action, [1940] S.C.R. 491.

The prosecution arose from the death of one Hilda Picot, a girl sixteen years of age, upon whom it was alleged appellants performed an illegal operation, for the purpose of causing a miscarriage, the death of the girl resulting about one week later.

The grounds of appeal set forth in the notice of appeal are:

(a) That the learned trial Judge erred in admitting the evidence of Police Constable Hodgson as to a statement made in his presence by Hilda Picot on the ground that such evidence was pure hearsay and was inadmissible.

(b) That the learned trial Judge failed to clearly instruct the jury as to the defence and thereby misdirected them.

On the argument of the appeal counsel for the appellants discussed grounds of appeal that were, I think, somewhat beyond the grounds stated in the Notice of Appeal as for example that there was no case made against the husband, but in my opinion the appeal must fail, as to both appellants, upon all the grounds argued except one, and that is the admission as part of a dying declaration made by Hilda Picot of her statement as to an occurrence in February, 1940, when, according to her statement, "Mrs. Benny Buck took me down to 182 Lisgar St., Toronto, friends of hers, and there tried to cause an abortion in a rooming house about two or three blocks from there with her hand, she had long finger nails and I guess she busted something as I bled just a drop or two."

In my opinion there was evidence properly admitted sufficient to sustain a conviction in the case of both appellants and there was nothing in the charge to the jury, either said or omitted, that affords appellants any substantial ground of complaint. Hilda Picot made a statement of some considerable length to Police Constable Hodgson while in the hospital but several days before her death. Neither of appellants was present when the statement was made and it was admitted only as a dying declaration. Some part of the statement was rejected by the trial Judge but in the main it was received in evidence.

Counsel for appellants strongly urged that no part of the statement was admissible contending that the Crown had failed to prove that it was made under a sense of impending death. He contended further that several parts of the statement were not relevant to "the circumstances of the death" and that they were therefore inadmissible under the rules relating to dying declarations.

It was the particular function of the trial Judge to satisfy himself that at the time the statement was made the declarant had that "settled, hopeless expectation of impending death" without which the statement could not be admitted in evidence and he having ruled, after hearing evidence at length and after argument by counsel, that the Crown had satisfactorily established everything essential to the admissibility of the statement as a dying declaration I find no ground upon which that ruling can be reversed. One may think that a little more delicacy might be shown in intruding upon a dying person than was used in this case and the methods by which evidence of the declarant's sense of impending death was obtained were crude, to say the least of them, but there is no reason to doubt the honesty of the witnesses who testified to the circumstances under which the statement was made. In any event the trial Judge was best able to determine that.

Some parts of the statement which the learned trial Judge permitted to be given in evidence, although objected to as not coming within the rules of evidence governing the admissibility of dying declarations, were I think improperly admitted, but excepting that part of the statement that relates to the occurrence on Lisgar Street in February which I have already quoted, I am of opinion that no substantial injury was done appellants by their admission. For example the statement as given in evidence tells of the intercourse from which pregnancy resulted and with whom it was. I do not see how that can be admissible evidence but I am clearly of the opinion that no substantial wrong or miscarriage of justice has occurred from admitting it.

In considering the question of the admissibility of that part of the statement that tells of the occurrence in February at the house on Lisgar Street, it is to be borne in mind that not only can no statement be admitted in evidence as a dying declaration that the same person could not give in evidence in the witness-box if living, but as stated by Abbott C.J. in *Rex v. Mead*, (1824), 2 B. & C. 605 "evidence of this description is only admissible when the death of the deceased is the subject of the charge and the circumstances of the death the subject of the dying declaration." This statement of the rule has often been quoted with approval and it has been said further that the rule should not be extended. *Rex v. Hind* (1860), 8 Cox C.C. 300. In *Ashton's Case* (1837), 2 Lewin 147, Baron Alderson used the words "his declarations as

to the cause of his death," to describe what may be given in evidence by way of dying declaration.

I think it is quite impossible to bring the statement as to an attempt made weeks before to cause an abortion, an attempt that was apparently both ineffectual and harmless, within the description of a statement of the circumstances of the death or a declaration as to the cause of death. It is conceivable that in some circumstances at the trial a living witness might be permitted to give evidence of the occurrence for it might become relevant evidence, but in no circumstances could it be admitted properly as a dying declaration.

Then remains to be considered whether it can be said that no substantial wrong was done by admitting this part of the statement. Unless that can be said there must be a new trial. One might be inclined to the view that there was ample evidence to support the conviction without the objectionable statement and that a new trial may not be fortunate for appellants. That, however, is not the determining factor so far as this Court is concerned. A statement went before the jury of a former attempt by the female appellant to cause an abortion and that statement may have carried weight with the jury in considering the guilt or innocence of appellants in connection with the death of Hilda Picot. Further when one recalls that the evidence of the female appellant was that Hilda Picot had herself caused the abortion in April and came to her afterwards, the statement that the female appellant had attempted on an earlier occasion to cause an abortion may well have induced the jury to discredit the evidence for the defence.

In my opinion the conviction must be quashed in the case of both appellants and there must be a new trial.

New trial ordered.

[COURT OF APPEAL.]

Frind v. Sheppard.

Maintenance—Solicitors—Negligence—Proof of special damage in action for maintenance—Limitation of actions.

A claim for maintenance lies where a person improperly and for the purpose of stirring up litigation and strife encourages others either to bring actions or to make defences which they have no right to make. A person may in certain cases properly and lawfully support, assist or maintain the action of another where they have a common interest through kinship with the litigant or where it is done from motives of charity to assist in justice being done. The essence of the offence of maintenance is the improper stirring up by a person of litigation in which he has no concern and as a direct result of which the plaintiff suffers special damage.

The success of the maintained litigation is not necessarily a bar to an action for maintenance. In the present case where the maintained litigation had been settled by compromise, it was held that the plaintiff had suffered special damage because it was clear that the maintained action would not have been commenced unless the defendant had stirred up the litigation and in this action for maintenance the Court could not say that in the settlement of the maintained action the plaintiff was only discharging his clear and just debts; to do that the Court would in effect in this action be deciding and giving judgment in the maintained action which was compromised by the parties.

AN appeal by the plaintiff from the judgment of Roach J., reported in [1940] O.R. 292, whereby the action was dismissed.

September 19th and 20th, 1940. The appeal was heard by ROBERTSON C.J.O., FISHER and GILLANDERS JJ.A.

A. C. Heighington, K.C., and E. F. Singer, K.C., for the plaintiff, appellant.

T. N. Phelan, K.C., for the defendant, respondent.

October 28th, 1940. ROBERTSON C.J.O.:—I have had the privilege of reading the reasons for judgment of Mr. Justice Gillanders, and I concur in them. I desire to add some comments on one or two aspects of this case.

The learned trial Judge in his reasons for judgment commented adversely upon the appellant as a witness, and was disinclined to rely upon his testimony. With great respect, I think the learned Judge failed to observe how much in the way of support for appellant's story is to be found on the record, and, in my opinion, he failed to give the weight that ought to be given to the circumstance that respondent, without whose evidence some matters must remain obscure, and whose professional honour was attacked, refrained from going into the witness-box.

Many of the facts that went to make up appellant's story are not in doubt. The ante-nuptial agreement (generally re-

ferred to in the evidence as the "marriage contract"), the marriage at Montreal on 11th December, 1930, the taking up residence in Toronto the next day, and the wife's departure within a day or two afterwards and her return to her former home at Grand'Mere, Quebec, are not questioned. That the wife's conduct was wholly without excuse appears from her own letter to appellant of a few months later. Respondent also in his letter to the wife of 28th January, 1938, says, "you deserted him and unless you are willing to live with him you cannot make him pay anything."

What is, however, of more immediate importance to this action concerns the visit by appellant and respondent in December, 1930, a week after the desertion, to interview the wife at her father's home. By the marriage contract appellant gave his intended wife a house, No. 44 Government Road in Lambton Mills, with all the necessary furniture, and agreed to provide for her support and maintenance. The marriage contract also provided that there would be no dower. Appellant's evidence is that his wife, on leaving him, said that if he would come down to Grand'Mere with his lawyer, she would cancel the marriage contract and relieve him of all obligations as soon as he liked, and that she was going to have the marriage annulled. Appellant says that it was to procure the cancellation of this contract and to be freed of all obligations that he and respondent went to Grand'Mere one week later; that respondent took with him for signature certain papers he had prepared and that, following negotiations carried on by respondent at Grand'Mere, certain papers were signed, and that he accepted and relied upon respondent's assurance that there had been a complete release of the marriage contract and of his obligations under it.

So far as appears by the evidence no document signed by the wife was obtained at Grand'Mere discharging the marriage contract or relieving appellant of its obligations. The only documents produced are a power of attorney to appellant by his wife to enable him to bar dower, and a consent or agreement signed by appellant not to oppose any application to set aside the marriage between the parties, and to consent to annulment or divorce. Yet the documents do not wholly fail to give appellant support, and that support is in my view the stronger by reason of respondent's failure to give evidence. I refer particularly to the last mentioned document (Ex. 2). This document was not

prepared by respondent in Toronto and taken with him to Grand'Mere. It was drawn by respondent at Grand'Mere after discussion with the wife and her father and a notary they had called in to advise them, and it was then typed by the wife's father. It is headed "In the Matter of a Marriage Contract Between Max Arno Frind of the City of Toronto the party of the first part and Marcelle Colin Frind, wife of Max Arno Frind the party of the second part," and is as follows:

"In consideration of the party of the second part signing a power of attorney to bar her dower and releasing her interest in the marriage contract, the party of the First Part hereby consents and agrees, that he will not oppose any application made to set aside the marriage between the parties hereto and will consent to an annulment or divorce, whichever, is desired by the party of the second part,

Signed

M. ARNO FRIND

Dec. 23, 1930."

WITNESS:

Ross Sheppard

What is of present importance in the document is the consideration it states. It includes the party of the second part "releasing her interest in the marriage contract", an interest which she was immediately entitled to enjoy. Counsel for respondent in his rigorous cross-examination of appellant appeared to endeavour to raise doubt whether the visit to Grand'Mere had as one of its objects the obtaining of such a release. I think there can be no doubt that respondent knew that that was one of the objects when he drew this document, even if it accomplished nothing in that regard. He gives no explanation of his purpose in inserting this consideration in the document.

There are other matters to consider with this that serve to corroborate appellant. First, is the fact that from that day in December, 1930, for more than seven years the wife made no claim under the marriage contract. Not only did the wife not demand support and maintenance, although as appears by her letter of November 20th, 1931, to appellant she had worked all the preceding summer in a beauty parlour and was at the time of writing employed in another, but a house at Lambton Mills with furniture, which was hers by the terms of the marriage contract, remained in appellant's possession, and, to respon-

dent's knowledge, he had offered it for sale. Both support and maintenance and the house and furniture were matters that she was entitled to have the immediate benefit of under the marriage contract, yet it was not until respondent, after seven years, had, by his mischievous intrusion, stirred the wife into action, that any demand was made under the marriage contract. The wife had at all times an original of the marriage contract in her possession, and that she had no aversion to demanding from appellant anything she thought she could get is evidenced by the avidity she exhibited to learn what respondent could do for her, and the alacrity with which she acted upon his suggestion. (See her letters of December 10th, 1937, and February 11th, 1938).

There is further to be considered the following statement in respondent's letter of February 28th, 1938, to the wife, "In looking over our files I find that the time Arno and I visited you you signed a document in which you agreed to release all your interest in the marriage contract on condition that he would not do anything to prevent your taking out an annulment of the marriage." With this letter is to be read the answer to it of 1st March, 1938, in which the wife does not correct or challenge the statement that she had signed such a document, but suggests that they fight it on the ground that it had been "signed under the influence of intimidation." These are strange statements from two of the parties engaged, and on the opposite sides, in the negotiations of December, 1930, if the fact is that not only was there no document of release signed, but it was determined by the wife after consultation and was announced, that such a release, although requested, was refused.

It is true the wife's father was brought from Grand'Mere to give evidence for respondent, and that he says that on the notary's advice his daughter objected to executing a release of the marriage contract. I do not know that his evidence read as a whole amounts to more than this, that the notary, in view of the possible complications arising from the fact that the laws of both Quebec and Ontario entered into the matter, had advised against signing a release, and that on that ground and not because of any objection they had to relieving appellant of his obligations, the formal release was refused. When asked by respondent's counsel as to the reason given for objecting he said, "Because a release of a marriage contract is not accepted in Quebec in that way."

These are matters upon which respondent, with whom conduct of the negotiations lay, could have thrown light, had he not considered that his own interests at the trial were best served by refraining from giving evidence.

It is not necessary, however, in my opinion to decide on this appeal the exact position of matters between appellant and his wife at the end of their meeting at Grand'Mere. Enough appears, I think, to make it plain, independently of appellant's evidence, that not only was a release of appellant from the marriage contract one of the purposes of going to Grand'Mere, but that the matter of a release was then discussed. Enough further appears in what has been pointed out to make it quite probable that although there was in fact no formal release, there was a distinct understanding between the negotiating parties that the marriage contract would not be enforced. In truth it is only in some such way that there appears to be any explanation for the words referring to a release that appear in the document, Ex. 2, drawn by respondent and typed by the wife's father, or any explanation for the wife's long quiescence until respondent instigated her to bring an action.

It is not unfair to respondent to give to the matters I have been discussing the full weight they will bear against him. He is the one person qualified to explain them. The document, Ex. 2, and the letter of February 28th, 1938, are his own, and they require explanation. It is not unjust to assume that when he refrains from offering an explanation, there is no explanation that will help him. In these circumstances appellant's evidence is not only uncontradicted but is substantially corroborated in all its essential particulars and should be accepted notwithstanding the impression created upon the mind of the trial Judge by his conduct and demeanour as a witness.

This is not a case where the appellant was under some clear legal obligation that he could have no honest excuse for disclaiming as might be the case of the maker of a promissory note or the purchaser of goods sold and delivered. Many things enter into a relationship such as had developed between appellant and his wife that may form valid ground for resisting any claim, and here the claim of the wife was more than ordinarily doubtful, and would seem to have little merit in morality. I think that, upon the principles applicable to actions for maintenance, enough has been established to require the Court to find

that whatever may have been the strict rights in law of appellant's wife in the action that was brought but not determined, her rights were sufficiently doubtful and the absence of any intention on her part to assert any such rights until she was prompted to do it by respondent is so evident that respondent's conduct in stirring up the litigation against appellant amounted to such maintenance as will support this action. The wrong is aggravated by the fact that respondent's whole knowledge of the circumstances of which he made use in advising the wife to attack appellant had come to him in his capacity as appellant's solicitor, employed to procure appellant's release from the claims of his wife.

I cannot part with this appeal without expressing my great regret that a solicitor of this Court should have had so little regard to the ethical standards of his profession as to so abuse the knowledge he had acquired of the affairs of his former client, and for no other motive than to gratify his private malice.

GILLANDERS J.A.:—The plaintiff appeals from the judgment of the Honourable Mr. Justice Roach, whose reasons for judgment are reported in [1940] O.R. 292, dismissing his action brought against the defendant, a solicitor, for alleged negligence and maintenance.

The facts leading up to this litigation are stated in the reasons of the learned trial Judge. Replete as they are with human interest, the evidence tendered by both sides was brief, and leaves much to be arrived at by inference rather than by direct testimony.

The claim for negligence is by the pleadings based on the allegation that the defendant solicitor was instructed by the plaintiff (then his client) to obtain a cancellation of a marriage contract between the plaintiff and his wife, and a release from all other marital obligations; that the defendant solicitor subsequently advised the plaintiff that he had obtained a document to this effect which, as it later turned out, was not correct, and that the solicitor was negligent in the preparation of the document and in the advice given.

The plaintiff and his wife were married on December 11, 1930, and four days later his wife left him in Toronto and returned to her parental home in Grand'Mere, Quebec. Later the same month, the plaintiff, with the defendant as his solicitor, pro-

ceeded to Grand'Mere to obtain, as the plaintiff says, a cancellation of a marriage contract, previously made between the plaintiff and his wife making certain provisions to her advantage, and all marital obligations. The pre-nuptial marriage contract provided, *inter alia*, for the husband bearing household expenses, providing support and maintenance for the wife, and gave and granted to the wife in consideration of affection and of her release of any community of property and dower a certain house and lot together with all the necessary furniture for the house. After discussions there with the wife, her father, and a local avocat, two documents were completed, one a power of attorney to the husband authorizing him to bar her dower right in his lands, and one, as the trial Judge says, a "unique" document signed by the husband as follows:

"In the Matter of a Marriage Contract Between Max Arno Frind of the City of Toronto the party of the first part and Marcelle Colin Frind, wife of Max Arno Frind, the party of the second part:

"In consideration of the party of the Second Part signing a power of attorney to bar her dower and releasing her interest in the marriage contract, the party of the first part hereby consents and agrees that he will not oppose any application made to set aside the Marriage between the parties hereto and will consent to an annulment or divorce whichever is desired by the party of the second part."

These documents were both drawn by the defendant. No further or effective release was obtained of the benefits conferred upon the wife by the ante-nuptial marriage contract or any other obligations of the husband arising out of the marriage which the wife might then or subsequently be able to enforce.

After a review of the evidence, the trial Judge finds that the plaintiff has not satisfied the onus of proving that his wife was willing to release him, or that the document referred to was intended to constitute such a release.

Whatever the defendant solicitor thought the effect of the documents completed on this occasion was, it seems significant that the situation which was the objective of the plaintiff husband was achieved for a period of over seven years, during which no claim was made or pressed by the wife for any rights in the ante-nuptial contract or arising from the marital relation. Early in 1931, it is said, she sought to return to her husband, but this

was refused, and no further claim was then made, and it seems probable that no claim might ever have been made except for the malicious act of the defendant in November, 1937.

The plaintiff and defendant had been for some years prior to the plaintiff's marriage close friends, and the defendant was the plaintiff's solicitor and legal adviser in his personal and business dealings. Apparently this relationship continued till near the end of 1937, when a dispute arose over one of the solicitor's accounts on which he eventually sued the plaintiff. At this time, when relations between the parties to this action were strained, and from motives which could only have been born of spite and malice and from a desire to do a disservice to his erstwhile client, the defendant wrote the plaintiff's wife advising her "If you get this letter let me know as I may be able to help you." Correspondence ensued as described in the learned trial Judge's reasons, from which it is amply clear, first, that the wife was quite in the dark as to how she might be helped by the defendant and, second, that when the defendant early in 1938 suggested to her that she should make a claim for alimony and later that in her ante-nuptial marriage contract she was to get a house and it was open to her to press this claim, she was not slow to act on the suggestion. She first signed a retainer to the defendant, but, later, apparently not satisfied with his progress in the matter, she herself placed her case in the hands of other counsel who took action against the husband for the real property referred to in the marriage contract and, in the alternative, for alimony. When the matter came on for trial before the Chief Justice of the High Court, at the suggestion of the Court the matter was settled by minutes of settlement which, *inter alia*, provided for the payment by the husband to the wife of \$500.00 per year to secure which the husband was to deposit with a trust company approved securities and was also to pay the costs of the wife's solicitors.

From the fact that the wife had made no claim against the plaintiff for over seven years, and that she seemed in ignorance as to how the defendant could help her,—but was not slow to adopt his suggestions when made,—and a perusal of her correspondence with the defendant, one cannot, I think, escape the conclusion that in her mind at least she had released her husband from all obligations arising out of the marriage contract or the marriage itself, and that although the document signed may not have

had this effect, both she and her husband were *ad idem* on this point, and the situation might have so remained indefinitely except for the defendant's act in writing the wife. As the learned trial Judge has aptly stated, "the seed which the defendant sowed in his letters to the wife took root and flourished and bore fruit which was very bitter to the husband."

In any event, I think that any claim based on the negligence of the defendant in the matters referred to is now barred by the Statute of Limitations. The claim in this respect is not based on fraud, but wholly on negligence. The transaction was completed and the defendant's account in this connection paid in January, 1931; and even although it be conceded that the plaintiff thought he had a complete release until the matter was brought into question by the wife's claim in 1938, the cause of action I think arose when that transaction was complete. It is urged that the cause of action was not complete till December, 1938, when the damages were suffered, and that the statute did not start to run until that time. In support of this contention we are referred to *Darley Main Collier Co. v. Mitchell* (1886), 11 App. Cas. 127, which discusses among other cases *Backhouse v. Bonomi*, 9 H.L. Cases 503. A perusal of these cases indicates that they are to be distinguished. Both were cases of the subsidence of and damage to real property owing to excavations made by the defendants more than six years before the damage was caused and the action brought. It is clear from the judgments that the excavations as such were legitimate and not unlawful, and it was only as and when the lawful enjoyment by the plaintiffs of their property was disturbed that any cause of action arose. This type of claim is, I think, to be distinguished from the case at bar where the negligence alleged, if any, occurred in 1930, and when the work was done and the account rendered and paid. It was then open at any time for the plaintiff to bring action alleging the negligence now pleaded and claim damages therefor. This is clearly stated as the law in *Smith v. Fox* (1848), 6 Hare 386, and no authority has been cited which, in my opinion, conflicts with that decision in a claim of this nature.

I agree with the learned trial Judge that the statute is a bar to the plaintiff's success on the allegation of negligence made in the pleadings.

There remains to consider the allegation of maintenance against the defendant and, in my view, this presents more difficulty.

For the plaintiff (appellant) it is urged that he has suffered direct and special damage as a result of the defendant wrongfully and improperly intermeddling and stirring up litigation and encouraging the wife to bring suit against her husband.

For the defendant it is urged, in short, that the plaintiff has failed in the circumstances here to establish that he has suffered damage by reason of the defendant's wrongful acts and the action for maintenance does not lie.

One cannot too strongly condemn from an ethical standpoint what the defendant did. It is perfectly clear that from that viewpoint it was highly improper; but the question of his liability or not on the basis of maintenance bears consideration. The questions involved are authoritatively discussed by the House of Lords in *Neville v. London "Express" Newspapers Ltd.*, [1919] A.C. 368. In that case the majority of the Law Lords, with Viscount Haldane and Lord Atkinson dissenting, held that an action for damages for maintenance will not lie in the absence of proof of special damage, and the majority of the Court, with Lord Shaw and Lord Phillimore disagreeing, were of opinion that to succeed in an action for maintenance it is not necessary that the maintained action or defence should have failed. This case is urged upon the Court by counsel for both the appellant and the respondent as authority for their respective contentions.

The learned trial Judge refers to the definition of maintenance by Lord Abinger in *Findon v. Parker* (1843), 11 M. & W. 675, at 682 (which is referred to in *Goodman v. The King*, [1939] S.C.R. 446, and in *Newswander v. Giegerich* (1907), 39 S.C.R. 354, and is discussed in the *Neville v. London "Express"* case) as follows:

"The law of maintenance as I understand it upon the modern constructions, is confined to cases where a man improperly and for the purpose of stirring up litigation and strife, encourages others either to bring actions or to make defences which they have no right to make."

From the full discussion of the matter by the various Law Lords in the *Neville* case, it is clear that a man may in certain cases properly and lawfully support, assist or maintain the action of another where they have a common interest through kinship with the litigant or where it is done from motives of charity to

assist in justice being done. As stated by Viscount Haldane at page 389:

"A common interest, speaking generally, may make justifiable that which would otherwise be maintenance. But the common interest must be one of a character which is such that the law recognizes it. Such an interest is held to be possessed when in litigation a master assists his servant, or a servant his master, or help is given to an heir, or a near relative, or to a poor man out of charity, to maintain a right which he might otherwise lose."

And by Lord Shaw at page 413:

"Blackstone says of the offence of maintenance that it is 'an officious intermeddling in a suit that no way belongs to one.' . . . 'This', he says, 'is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression A man may however maintain the suit of his near kinsman, servant, or poor neighbour, out of charity and compassion, with impunity.'

"Here is, in this last sentence, what in other treatises and text-books is called the list of exceptions, but which upon examination are not exceptions to officious interferences, but are defences to it."

It seems clear that in the case at bar the defendant had no interest in the wife's claim that justified his intermeddling, and that he injected himself into the matter not from any justifiable reason but quite improperly with no common interest such as the law recognizes and which would justify intermeddling or assisting the wife.

Under the circumstances here were special damages sustained and proved by the plaintiff? In the *Neville* case the plaintiff had unsuccessfully defended the maintained action and judgment was given against him for the return of money obtained by fraud together with costs. Lord Finlay held that the plaintiff having had to repay money obtained by fraud, and costs because he resisted paying, had not thereby suffered special damage. "It cannot be regarded as damage sufficient to maintain an action that the plaintiff has had to discharge his legal obligations or that he has incurred expenses in endeavouring to evade them." For this reason he held the action failed, but proceeded to state, at page 381:

"I am unable to agree with the broader proposition put forward on behalf of the respondents, the Newspaper Company, to the effect that no action can be maintained for maintenance unless the action or defence maintained has failed. Nor can I assent to the proposition that the offence of maintenance exists only when the claim or defence maintained is unfounded or when it has been maintained by procuring false evidence or in some other unlawful way. Maintenance is a common law offence. It was not constituted by statute, although statutes have been passed imposing penalties on particular kinds of maintenance. As regards maintenance at common law, there is not, so far as I am aware, any authority in support of either of the above propositions. The essence of the offence is intermeddling with litigation in which the intermeddler has no concern, unless the case falls under some of the heads of exception to which I have above adverted. It was considered that it is against public policy that litigation should be prompted and supported by those who had no concern in it."

It having been held that the success of the maintained litigation is not necessarily a bar to an action for maintenance, it is unnecessary to consider the success or failure of the maintained litigation here except in so far as it may throw light on whether or not the plaintiff sustained special damages.

The learned trial Judge held that the plaintiff's wife had legal claims against her husband; that she had a right to bring action for their enforcement; that the settlement during the trial constituted an admission of these rights by him, and that therefore, having only been forced to meet his just and legal obligations, he has suffered no special damage. The reasoning has much force. Under circumstances such as those in the *Neville* case, or where the maintained suit is on a clear debt, it may well apply. But I incline to the view that the circumstances of the case at bar may be distinguished.

In the maintained action, the plaintiff's wife made various substantial claims against her husband. The actions was compromised during the course of the trial, and it cannot be viewed in the same light as a case where the matter is tried on the merits and judgment given. Both parties to the litigation may have felt their legal rights doubtful, and because a compromise was so effected which ended the pending litigation, I am of opinion that it should not therefore be held that the plaintiff husband is

in the same position as the plaintiff *Neville*, and has therefore suffered no special damage. He was sued and put in jeopardy; but while it probably cannot be said that the action failed, neither, I think, can it be said, if it is important, that in the proper sense the action succeeded. This Court should, I think, hesitate to say that in the settlement which he made he was only discharging his clear and just debts, and the costs which he incurred were expenses in endeavouring to evade his legal obligations, and that therefore he has suffered no damage. To do that we would in effect be deciding and giving judgment in the action which was before the learned Chief Justice and which was compromised by the parties. In my view the essence of the offence here is clear, that is, the improper stirring up by the defendant of litigation in which he had no concern and as a direct result of which the plaintiff suffered special damage.

As to damages: It seems improbable that, apart from the defendant's intermeddling, any action would have been brought by the wife against her husband. As a result of that action the evidence shows he paid costs of his wife's solicitors amounting to \$2,532.46. In and by the settlement he is to pay his wife \$500.00 a year, and as security for which he has deposited with a trust company securities to the value of approximately \$10,000.00.

After consideration of the discussion of this matter in the *Neville* case, and considering the facts here, and keeping in mind the possibility, although not the probability, that at some time the wife might have pressed a claim against her husband apart entirely from the intervention of the defendant, I think the appeal should be allowed and that the plaintiff should have judgment against the defendant for the sum of \$4,000.00 together with costs of the trial and of this appeal.

FISHER J.A. agreed with GILLANDERS J.A.

Appeal allowed with costs.

[COURT OF APPEAL.]

Kennedy et al. v. Hanes et al.

Negligence—Occupiers of premises—Injury to customer in store—Customer shot in eye by air pistol operated by nephew of occupier of store—Knowledge by occupier of store of possession and use of air pistol by nephew—Liability of occupier of store—Damages.

The infant plaintiff, for the purpose of purchasing some goods, entered a shop owned by the defendant W. H. and which was then in charge of the defendant F. H. While in the shop the infant plaintiff was struck in the eye by a bullet discharged from an air pistol operated by the defendant C. H., who was the nephew of W. H. and F. H. The infant plaintiff's eye was destroyed and this action was brought against F. H., W. H. and C. H. to recover damages for the personal injury sustained by the infant plaintiff.

Held by the Court of Appeal, affirming the judgment of Urquhart J., Fisher J.A. dissenting, that all the defendants were liable to the plaintiff for the injury sustained by him. On the facts the defendant C. H. was negligent in firing the gun towards the infant plaintiff. The infant plaintiff was in the shop as an invitee and the defendant F. H., who was in charge of the shop, had, under the circumstances, such knowledge of the danger of permitting the defendant C. H. to remain in the shop with his air pistol that it amounted to permitting on the premises a danger known to the defendant F. H. to exist, and to this danger anyone entering the shop was unwittingly exposed. The defendant F. H. was the servant of the defendant W. H. and upon the principle of *Indermaur v. Dames* (1867), L.R. 2 C.P. 311, the defendants W. H. and F. H. were in law responsible to the plaintiff for the injuries which he received.

AN action to recover damages for personal injuries sustained by the infant plaintiff.

The action was tried by URQUHART J., without a jury, at Welland.

A. L. G. Brooks, K.C., and O. M. Walsh, K.C., for the plaintiffs.

R. B. Law, K.C., and T. F. Forestell, K.C., for the defendants.

March 18th, 1940. URQUHART J.:—On the 18th September, 1939, the infant plaintiff Thomas W. J. Kennedy, a boy twelve years old, was shot in the right eye by a bullet discharged from an air pistol in the hand of the infant defendant Carl Hanes, in the store of the defendant William Hanes, at Fort Erie. The eye had to be removed as a consequence.

The infant plaintiff is a very bright and very handsome young boy. He has made excellent progress at school and his father, who is head yardmaster in the Michigan Central Railway yards at Fort Erie, Ontario, had planned to send him to college. The father has two other children, but I think he would be quite able financially to send the boy to college if the boy showed particular aptitude in his studies, which to date he

has. The infant defendant is a boy of sixteen years of age. He is a tall boy, almost fully grown and head and shoulders taller than the infant plaintiff. The mind of the infant defendant, however, while it is as bright as the ordinary boy's of that age, has not developed in conformity with his physical growth, and he still plays with boys much younger and smaller than himself at games of a type more suitable for younger boys than for one of his age and size.

The infant defendant is a nephew of and resides with a maiden aunt and the two other defendants who are bachelors. All of these are in middle age. About two years ago when his last remaining parent had died, the infant defendant and his brother (now aged thirty) were taken back after the funeral by his uncles and aunt to live with them at Fort Erie. There was no arrangement about this with anyone, but the adult defendants and their sister, who all live together, thereafter supported the infant defendant, kept him at school, paid for his clothing and looked after him in pretty much the same way as they would have looked after their own child. The defendant Frank Hanes gave him his pocket money, apparently out of his own earnings in the store of his brother.

The adult defendants are men of good character and industry, but, like so many other uncles, were indulgent with the boy and, if they gave commands to the boy, would as often as not fail to see that these commands were obeyed by the infant defendant.

An attempt was made in evidence by the plaintiffs to prove that the adult defendants were partners in the store business in question which was carried on at Fort Erie under the name of "Hanes Groceries." The proof offered fell short, in my opinion, of establishing them as partners. There were a number of suspicious circumstances, but not enough to make me find them to be partners, and I do not think one should find two such people to be partners unless the evidence is fairly conclusive, which it is not in this case. Reference to *The Electric Heat Control Co. v. McClennan, et al.*, [1940] O.W.N. 49. I find as a fact on the evidence that they were not actually partners in the business, but that in fact the defendant William Hanes was the sole proprietor thereof, and that his brother, the defendant Frank Hanes, worked for him at a wage which varied from time to time with the success or otherwise of the

business. When one sees and hears the two brothers, one can easily understand why William is the owner and Frank merely the employee.

I find also on the day in question that at or near the time of the occurrence complained of the defendant William Hanes was out of the store engaged in cutting the lawn at the back of the store, and that the defendant Frank Hanes, his employee, had sole charge of the store with the knowledge and consent of the defendant William Hanes, and was in the act of waiting on customers of whom there were two, a girl named Fern Hoffman and the infant plaintiff.

It is also argued that these two adult defendants were in *loco parentis* to the infant defendant, and therefore liable for any tort committed by him. In a sense they were in *loco parentis*, but also in the same household and having some control or supervision over the infant defendant was the maiden aunt above mentioned. For a time also the elder brother of the infant defendant and his nearest of kin lived with the uncles and aunt, but the evidence is that he had married shortly before the occurrence in question and had gone to live apart from the others, although he was in daily touch with them, because he conducted a radio repair and sales shop in the rear of the grocery store premises, and to this shop the boy had constant recourse. The brother was usually consulted in matters concerning the boy.

During the latter part of August, 1939, after his return from the second of two fortnight holidays in Muskoka, and some time after his birthday, which was on August 8th, the infant defendant, unknown to the uncles at the time, as I find, and with some money which had come to him partly as a birthday present and partly from what he had saved out of the pocket money given to him by his uncle, Frank Hanes, purchased in Buffalo, New York, an air pistol (erroneously called in the pleadings an air revolver).

This air pistol which, according to the advertisement (Exhibit 6) is called The Benjamin Air Pistol with lever handpump, is, I find, an extremely dangerous weapon in the hands of a minor, if not in anybody's hands. It is guaranteed to be accurate and is advertised to have amazing maximum velocity. It is rifled. The pistol is a breach loader and takes a bullet a little larger than a BB shot, and about the same size as a buckshot.

After loading it is cocked by pulling back the firing pin. Then by actuating a lever handpump underneath the barrel the air pressure is applied, and a touch of what is described in the advertisement as a hair trigger, discharges the pistol. The air pressure may be applied even though the pistol is neither loaded nor cocked. Only one bullet can be inserted in the breach at one time.

One manipulation of the lever handpump will give the discharge considerable force. Two will give more force and four manipulations provide the maximum force, after which time, the law of diminishing returns sets in, and extra pumps of the lever will give it little, if any, extra force.

Late in August, 1939, the infant defendant, while playing a game called "Cops and Robbers" with some smaller boys had as part of the game in his role of "robber" shot another small boy in the leg with the pistol. I find this to be a fact, believing the evidence of the boy and his mother against that of the infant defendant. This episode, however, was unknown, as I find, to the uncles and probably to other members of the boy's family.

The boy's brother had had a .22 rifle and an air rifle, and the boy himself was accustomed to use these on occasions, and in fact had had for the year 1938 and into 1939 a provincial and municipal hunting license, which was taken out long before he acquired the pistol in question. He was, therefore, somewhat accustomed to fire-arms, and this with the knowledge of the uncles. He had had on previous occasions both an air gun and cap guns in the store to the knowledge of William Hanes and Frank Hanes, but in course of passing through the store.

The adult defendants, however, knew that he had in mind buying the pistol (either that or a movie camera which the uncles favoured), and had discussed the merits of this particular pistol with him, and had seen a larger and more comprehensive advertisement than Exhibit 6 themselves, in which the workings of the pistol were more fully described according to the boy's evidence. They would, therefore, know of the working of the pistol in question, and also should have known that it was a very dangerous weapon. The boy says that these uncles made no objection to either the pistol or the camera, and I think that this is probably correct. The uncles say that they

did not know of the actual purchase until a time very close to the day of the occurrence, and I believe that to be true. Frank Hanes says that he knew that the infant defendant had the pistol about four days before September the 18th, and that he and his nephew had had it down the Niagara River doing some shooting. With the pistol had come 1,000 bullets, and more than 250 of these and probably closer to 500, had been used by September 18th, so that the boy must have done considerable shooting with the same. William Hanes did not know of the boy having the pistol until the day before the occurrence in question. At that time, it being Sunday, the two uncles and the aunt had gone with the boy to the cemetery, and there Frank Hanes and the boy had done some shooting with the pistol at walnuts in a tree. The uncle William Hanes, who is rather "straightlaced", I imagine, reproved the boy, not on the ground that the pistol was dangerous, but rather that he considered the cemetery to be an unsuitable place and Sunday an unsuitable day for such exhibitions. I find that he said in a mild way, "Don't have that old gun around," although the boy said he said a little more to the same effect. The way the boy puts it is that William Hanes said that he should not have brought the pistol out to that place and on that day. However, he did not see that the gun was put away or was taken from the boy, and, as he put it, he let the matter drift. Nephew-like the boy paid no attention to the admonition. I do not think, however, he could on the evidence take the words used by the uncle as meaning more than that he should not use the gun on Sunday and in a cemetery.

On the day in question, which was Monday, September 18th, the infant defendant left school about 3.15 p.m., secured the pistol at the house and a little later crossed the yard which lay between the house of the defendants and the store in question operated by William Hanes. He entered the store from the rear with the pistol in his hand. The defendant William Hanes was working at the back and saw the boy go by, but, as he says, and I believe him and the boy on this point, he did not see the pistol in the boy's hand. The boy says (although I am very doubtful about this I give him the benefit of the doubt) that he carried the pistol down at his left side and that William Hanes was on his right and so could not see the pistol. I have no doubt, however, if William Hanes had seen the pistol he would

have made no effective objection to the pistol going into the store. It was not his nature to make effective objections, and besides the boy had in the past gone through the store carrying an air gun to the knowledge of the uncles.

At about a quarter to five p.m., as I find, believing the infant plaintiff and his father on this point, the adult plaintiff drove the infant plaintiff to the store for the purpose of purchasing one dozen rubber rings for "gem jars." The father was in a hurry to get to his work at five o'clock and so the infant plaintiff ran into the store and put a quarter on the counter. When the infant plaintiff came in, and I find this to be a fact, Frank Hanes was talking and joking with the girl customer, Fern Hoffman, who was in the act of purchasing some bacon from him, and with his nephew, the infant defendant who was standing near by. The infant plaintiff says that Frank Hanes came over and asked what he wanted and he asked for the rings and that then the others were five or six feet away across the counter from him. The next thing that happened was that the infant defendant approached where the infant plaintiff was standing and the infant plaintiff asked him what he had in his hand. The infant defendant said, "It is an air pistol, Tom" or words to that effect. Then he pumped the pistol and took aim at the infant plaintiff, generally in the direction of the infant plaintiff's body, taking a momentary sighting and pressed the trigger, with the result that the infant plaintiff's eye was put out.

One point about the above description is noteworthy. The infant plaintiff is a most observant boy and he does not say that he saw the infant defendant load the pistol. In view of what hereafter follows this may be quite important. It is, however, quite unlikely that he would accurately observe all the motions involved.

I find, believing the infant plaintiff and his father on this point, that the infant plaintiff was only in the store a few seconds, before he was shot. In his evidence also Frank Hanes says that he was not in the store half a minute before the "accident" happened.

In fact where the two plaintiffs differ in their evidence with any other witness as to facts, I prefer to believe them. Next in order of veracity in my estimation come the two uncles, whose story in the main, except as I refer to it herein, I believe. I

cannot place much reliance on the word of the infant defendant. He was most contradictory both in his own evidence and in his examination for discovery. His evidence also contradicts materially a statement which he made shortly after the occurrence, at a time when he was not in the presence of his uncles as he was at the trial and examinations for discovery. I do not think the boy was unduly nervous at that time, believing the witness Sprung on that point. My observation of the infant defendant was that he was always there with the ready answer when any difficulty arose, and I have no hesitation in finding generally that his version of the occurrence, and many other incidents, is unreliable.

How did the infant defendant employ his time between the time when he came to the store and 4.45 p.m. when the infant plaintiff was shot? He accounts for part of the time by saying he was in the radio shop at the rear. He was also as the evidence shows for some time outside the store, and probably he did some shooting there. About seven minutes before the infant plaintiff came in to the store, the witness Fern Hoffman, who is a young girl of about thirteen, entered. She was called by the plaintiffs although not on their side. She proved to be a most reluctant witness, though I would not pronounce her hostile. She was very friendly with the defendants. She says that when she came to the store she saw Frank Hanes and the infant defendant standing in front of the store, and that the infant defendant had a small gun in his hand. Later she qualified this by saying that she was not sure about having seen the gun. She also said when she came along towards the store she was under the impression that Frank Hanes and the infant defendant had been shooting. Then she entered the store and they followed her in. In the store she says that the infant defendant was showing her the force of the air in the "gun" and how much noise it made, and that he charged it with air and discharged it three or four times making a considerable noise. Carl Hanes said he was shooting the gun in Fern's direction, but not with bullets in it. The boy said that he might have been shooting at a tree when he was outside, and the probability is that the boy was shooting with the pistol outside the store, and that the defendant Frank Hanes was looking indulgently on before either of these customers came to the store.

Fern Hoffman did not see the actual shot fired. When the infant defendant demonstrated the gun to her, she says, he put in no bullet. Under the circumstances, I cannot pay a great deal of attention to what she said except where her story corroborates that of the plaintiffs.

Frank Hanes says in his evidence that he was attending to Fern Hoffman and cutting some bacon, which she had ordered, at a counter near the rear of the store, that he heard the banging of the pistol going on and, after three or four times, he ordered his nephew, the infant defendant, to stop. His reason given for so ordering, if he did this, was not because of his apprehension of any danger but because of the noise. He says he told his nephew to get out. His nephew did not obey and Frank Hanes did not see that he did obey. Frank Hanes tries to say that, just as he told the nephew to get out, the infant plaintiff walked in and that he was not in the store half a minute before the accident happened. I cannot find that Frank Hanes did order the boy out just as the infant plaintiff was coming in, nor can I find that he ordered him out at all.

The infant plaintiff, whom I believe on this point, says that the three inside the store when he came in were talking together and laughing. It is significant also that Fern Hoffman says nothing about any ordering out or remonstrating on the part of Frank Hanes. It is possible that Frank Hanes did make some remark to the nephew, but I find that, if he did, he had plenty of time to see that his order was obeyed. I doubt if he gave such an order. The scene at the time the infant plaintiff came in did not evidence any order or sternness on the part of Frank Hanes, and I believe him to be incapable of such sternness when dealing with his nephew. I cannot, however, see that it makes any difference whether he gave the order to get out or not. If he did not, he failed in his duty, and, if he did and he did not see that his order was carried out having, as I find, had plenty of time to do so, he still failed in his duty in my opinion.

So it comes down to this as I see it. William Hanes is the owner of the store; Frank Hanes, his brother, was his employee in charge of it that day; the infant defendant was in the store armed with a highly dangerous weapon; both the uncles, particularly Frank Hanes, knew its qualities and propensities and that it was a very dangerous weapon; to the knowledge of Frank Hanes, the infant defendant was charging it with air and dis-

charging it in the store; Frank Hanes allowed him to do this and did not see that he did not flourish the weapon around in the store in the direction of customers; he allowed him to remain in the store; the infant plaintiff entered the store as an invitee; the infant defendant charged the pistol with air, cocked it (to say the least), took aim at the infant plaintiff and pressed the trigger, causing serious injury.

The following questions then arise:

(1) Are the two uncles, the adult defendants, liable for the negligence or act of the minor defendant by reason of the fact that he was in their charge, or, as it is expressed by counsel for the plaintiff, they stood in *loco parentis* to him?

(2) Is the defendant William Hanes, as owner of the store, liable for injury to a customer (an invitee) by reason of the negligence of or assault by his nephew in the store, which negligence or assault could have been prevented and should have been prevented by his brother as employee?

The action is laid in negligence against the three defendants. As regards the infant defendant it might equally be laid in assault upon or trespass to the person of the infant plaintiff.

If the infant defendant inserted the bullet into the pistol, charged the pistol with air, cocked it, aimed it and fired, that would be an assault. It will also be an assault, in my opinion, to point any kind of a fire-arm, or air pistol, even if unloaded, under the circumstances.

The Criminal Code also makes such action a crime for by section 124, "everyone who without lawful excuse points at any person any fire-arm or air gun, whether loaded or unloaded is guilty of an offence . . ."

I would think that the weapon in this case would come under the definition of air gun, although it was the opinion of Latchford C.J. in *Montesanto v. Di Ubaldo*, [1927] 3 D.L.R. 1045, at p. 1046, that an air rifle actuated by a compressed spring is probably not an air gun within the meaning of section 119 of the Code (now section 125), the section which prohibits the sale of air guns to minors. In the case at bar the pistol would appear to be strictly an air gun within the meaning of the above section.

I do not think that it affects the question very much because the pointing of such a weapon as the air pistol in question at anyone would be a tort, and if damage accrued in the course of that pointing, the person pointing would be liable.

One of the theories of the defendants is that the boy pressed the trigger not knowing the pistol was loaded. It is said, and, although I think it is highly improbable, it is possible, that a bullet might have been lodged in the pistol at an earlier time. As, for example, when the boy was firing outside and that owing to only one charging of air at a time the bullet might not have been expelled, but that with successive charges and explosions it might have worked forward; and, being at the mouth of the barrel when the pistol was aimed at the infant plaintiff, the final explosion was effective and the bullet expelled striking the infant plaintiff, but that at no time would the infant defendant be aware that the pistol was loaded with a bullet.

As I have said, this is a possible theory, and it is given some point to by the fact that the plaintiff did not say that he saw the infant defendant insert a bullet into the pistol, but, if that were so and the infant defendant knew that this was liable to happen, then he was not only guilty of an assault, but was guilty of the grossest kind of negligence in pointing the pistol at the infant plaintiff. Even if he did not know, it is to my mind negligence in pointing a supposedly unloaded pistol at another and pulling the trigger.

The infant defendant's evidence on this point is that he did not at any time load the pistol (I presume he means in the store). He says he had carried guns in the store before, but they were BB guns or cap guns. I do not accept his version of how the accident (if it might be called such) happened. Nor do I believe him when he says that Frank Hanes had told him to take the pistol out of the store and that he did not obey because he did not mean to be rude to the infant plaintiff. In his evidence he made the suggestion about a bullet sticking, but he claims that it was only a few days before the trial that he discovered this propensity of his pistol. He would scarcely have fired 250 and perhaps nearly 500 bullets, which he had done before the occurrence, without knowing about the propensities of the pistol. As he practically admits shooting off the pistol outside the store, there is a possibility he may have reloaded before he went in, and he may not have expelled the last bullet by the three or four snaps he made close to the ear of Fern Hoffman.

In his cross-examination he seemed very familiar with the peculiarities of the pistol, and I believe that he knew of them long before the occurrence in question. I am of opinion, there-

fore, that either he was negligent or that he assaulted the infant plaintiff by pointing the pistol, or that by a combination of negligence and assault the injuries to the plaintiff were caused.

To come back now to the two legal questions above set forth, the first is as to the general liability of the adult defendants for the tort of the infant defendant.

It has been laid down in various cases that a father is not liable in damages for the tort of his child committed without his knowledge, participation, or sanction, and not in the course of employment. One of the leading cases in our Courts is *Thibodeau v. Cheff* (1911), 24 O.L.R. 214, in which the above principle is laid down. In that case, however, the father knew of the propensity of the child to do damage of the kind complained of, and, as he did not take steps to deal with the situation, he was held liable.

See also *File v. Unger* (1900), 27 O.A.R. 468, where it was held that, unless the position of master and servant was present and the child was acting on the parents behalf, there was no liability of the father for a tort of a 20 year old son who injured another while engaged in his own affairs.

In *North v. Wood*, [1914] 1 K.B. 629, the father allowed his daughter, aged 17, to keep in his residence a dog which was known to him to be savage. She was the owner of the dog and alone paid for its keep. The daughter was an employee of the father. One day, the dog was outside of the defendant's shop when it attacked a pup passing on the street. It was held in this case that the daughter had come to the age of discretion, and that she alone was responsible. It will be noted, however, that in this case neither the pup nor its mistress, who was leading it by the store, was on the store premises, and, therefore, was not in the position of invitee.

A parent may also be liable if he has control of the dangerous thing, or is negligent in allowing the infant to have control of it: *Bebee v. Sales* (1916), 32 T.L.R. 413. In that case, the defendant gave an air gun to his son of 15 as a present. The son later broke a window in a mill. On complaint being made by the miller, the defendant promised to destroy the gun, but failed to do so. In play some time later, the boy shot a playmate in the eye. It was held that, after the warning given by the defendant, it was negligence on the part of the father to allow the plaintiff to keep the gun. This case, of course, is different in cer-

tain respects from the one at bar, namely; there the gun had been given by the father to the child; the father knew before the occurrence in question the boy was reckless in its use, and knowing that, he had failed to heed a warning. Lush J., in sustaining a County Court Judge, said that he was far from saying that, even if the father had not been warned beforehand, there would have been no negligence on his part. But then again, the father had put the dangerous object in the hands of a young boy.

I think, in the case at bar, where the boy had bought the gun himself out of his own moneys, where he was 16, and had had guns before, where any propensity to shoot at other boys was unknown to his uncles (his guardians), where the boy was not employed by either, I would have to go a long way to find that a parent in such circumstances, much less an uncle, would be liable merely because the boy had committed a tort.

I am unable to find any case where, under such circumstances, the law as to liability of parents for tort has been extended to guardians; and I feel that I ought not to extend it.

The only reference I was able to find was in 28 English and Empire Digest, p. 282 (footnote), where it is said: "Guardians of a minor cannot be held personally liable for torts committed by such minor." There is a reference to a case of *Luchmun Das v. Narayan* (1871), 3 N.W. 191 (Ind.). Unfortunately, I cannot find that case in the library.

Under the circumstances under which this boy had the pistol, except for it being in the store under the conditions that it was, I could not find parents in charge of the boy liable, and I see no reason for holding the two uncles so liable merely on the ground that they were in *loco parentis* to the boy.

More serious, however, as far as the adult defendants are concerned, is the question as to whether William Hanes, by reason of the negligence or failure of duty on the part of his brother Frank Hanes, who is his employee and in full charge of his store at the time, and Frank Hanes by his own negligence, are liable for the injuries sustained by the plaintiff as an invitee in the said store which he is conceded to be (cf. Halsbury 2nd Ed. Vol. 23, p. 602), and, therefore, in a different position than if he had been shot by the infant defendant in a public place away altogether from the adult defendants or the store in question.

It is my opinion that, while the adult defendants, under the circumstances above outlined, would have owed no duty to a member of the public for the tort of the infant defendant committed apart from them, they owed a duty to the public coming into the store as invitees—that the premises would be in a safe condition and free from any unusual danger, and that the public could transact its business without injury.

In *Indermaur v. Dames* (1866), L.R. 1 C.P. 274, at p. 287, Willes J. said: “. . . We are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, expressed or implied. The common case is that of a customer in a shop: but it is obvious that this is only one of a class; . . . he is, according to undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger of which the occupier knows or ought to know, such as a trap-door left open, unfenced and unlighted.” And, at page 288, “And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall, on his part, use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.”

These last words were quoted with approval by Kelly C.B. on appeal in *Indermaur v. Dames* (1867), L.R. 2 C.P. 311, at p. 313.

In Beven on Negligence, 4th Ed., vol. 1, p. 574, the author, in discussing *Southcote v. Stanley* (1856), 1 H. & N. 247, where an hotel keeper was held not liable to a visitor to his hotel who was cut by a piece of glass falling from a door which he had opened, said, “Had the plaintiff been a guest using the hotel, the defendant’s obligation would have been greater. He would have been bound to know that things like the window will ultimately get out of order, and that there is a duty from time to time cast upon him to turn his attention to them. If he could show that he did investigate, and there was some latent defect which he could not discover, he would discharge the duty upon him; if

he did not discover what he ought, on investigation to have discovered, then he would be liable for the consequences."

Mitchell v. Johnstone Walker Ltd. (1919), 47 D.L.R. 293, a decision of the Court of Appeal of Alberta, is a case where a merchant, although he knew of an impending danger to his premises by reason of the collapse of a nearby wall, failed to notify a customer of the risk.

The Court held in that case that an employee of the defendant probably did not know of the danger, but that he ought to have known of it, but having weighed conflicting opinions as to the danger he decided to take a chance. It was held to be the duty of the defendant to warn customers and let *them* take the chance or to exclude them from the danger zone until the threatened peril had been removed. The defendant had a duty to warn the plaintiff and, not having done so, the defendant was held liable.

Nearly all of the cases are ones where the injury to the invitee has been caused by a defect in the premises of which the owner knew, or ought to have known. There are many cases of this type.

It would seem to me, however, that the principle enunciated in *Indermaur v. Dames* (*supra*) is not confined exclusively to defects in the premises, but would extend to any unusual danger arising, like a vicious dog, or, as in the case at bar, a dangerous weapon in the hands of a young boy.

Now, in the last quoted words of Willes J., the customer in a shop is entitled to expect that the "occupier shall on his part use reasonable care to prevent damages from an unusual danger which he knows, or ought to know," and that must be determined as a matter of fact by the jury. That case was one of defective premises, but I see nothing in it which precludes danger from an animal on the premises or a human being on the premises.

Mansfield v. Baddeley (1876), 34 L.T.R. 696, is a case where a servant, a dressmaker, was sent by her employer to the kitchen to which she usually had no resort in the ordinary course of her work. There happened to be a vicious dog in the kitchen which, as a rule, was tied up, to the knowledge of the plaintiff. It happened to be untied upon the occasion in question, and it attacked her and bit her leg. In this case, the position of the plaintiff, who was held entitled to recover, was not as high as

that of the plaintiff in the case at bar, who was an invitee, and in the highest position. She was a servant, and, as Grove J. puts it at p. 697, she was asked to do something which was no part of her service, in fact, a mere good-natured act. The plaintiff there might possibly have been considered an invitee, although no mention is made in the report of that case as to what her position was. If she was an invitee, then she was subjected, by the employer to an unusual danger, of which he knew or ought to have known. The situation is somewhat the same as that discussed by Beven in regard to the position of an invited guest and the falling glass.

In his article on "Duties of Occupiers and Owners of Dangerous Premises" in (1924) 2 Can. Bar Review 24, at p. 29, Mr. Vincent C. MacDonald of Halifax points out that:

"It would seem that the duty to an invitee is not confined to preventing damage from the physical condition of the land and structures but also extends to protection from all unusual dangers to which the invitee is exposed while on the premises and which are due to some work or activity on the premises. Thus a theatre owner has been held to be bound to use reasonable care to prevent a spectator from being exposed to any unusual danger arising out of the performance of a play, as, for example, danger from a shot fired by an actor on the stage."

Cox v. Coulson, [1916] 2 K.B. 177. In this case an actor in the course of the performance fired a pistol which should have only contained a blank cartridge, but in the barrel of which, by some unexplained mischance, there was also a second cartridge of smaller size. The plaintiff, a seat holder in the theatre, was severely wounded in the wrist.

The Court of Appeal held that the true relation of the parties was that of invitor and invitee, and that the defendant owed to the plaintiff a duty to use reasonable care that she should not be exposed to an unusual danger, the existence of which the defendant either knew or ought to have known, which expression is that of *Indermaur v. Dames*.

Swinfen Eady, L.J. after setting out the facts says, at p. 184: "His liability is that of an invitor towards an invitee as expressed in *Indermaur v. Dames* and in *Norman v. Great Western Ry. Co.*, [1915] 1 K.B. 584, at p. 592," and then the much quoted statement of the law as to unusual danger follows:

Bankes L.J., at p. 191, also refers to the principle as being applicable. He goes on to say:

"It seems to me obvious that the duty of the invitor in a case like the present is not only confined to the state of the premises, using that expression as extending to the structure merely. The duty must to some extent extend to the performance given in the structure, because the performance may be of such a kind as to render the structure an unsafe place to be in whilst the performance is going on, or it may be of such a kind as to render the structure unsafe unless some obvious precaution is taken."

It would seem quite clear from this case that the principle in the above last mentioned cases was applicable in the case of an active agency as well as in the case of defective premises.

The Cox case has since been followed in *Hall v. Brooklands Auto Racing Club*, [1933] 1 K.B. 205, a case where a racing car at an automobile race track collided with another car and veered off, going over a kerb and breaking a railing and killing two spectators, who had paid admissions, but were allowed to stand alongside the railing instead of sitting in the grandstand; and approved of in *Fraser-Wallas v. Waters*, [1939] 4 All E.R. 609, where, however, the plaintiff failed to establish negligence, while *Welsh v. Canterbury and Paragon (Limited)* (1894), 10 T.L.R. 478 is to the same effect and decides that dangers caused by animals or persons on the premises of the invitor came equally within the rule of *Indermaur v. Dames*, along with dangers from defective premises.

There is one case in our Court of Appeal which seems to restrict the operation of the rule in *Indermaur v. Dames*. The headnote of that case, *Reid v. Town of Mimico*, (1926) 59 O.L.R. 579, says: "The rule in *Indermaur v. Dames* . . . is confined to defects in the premises occupied and controlled by the invitor." This was one of the cases of defective premises that I have referred to above, or rather it was a case where the defect was a hole just off the premises into which a customer had fallen on leaving the store. The above quotation in the headnote is taken from somewhat similar words used in the judgment of Masten J.A., at p. 584. I would think, however, that this part of the headnote and the statement of the learned Judge on which it is based, are merely *obiter*, and as Lord Atkin said in *M'Alister v. Stevenson* (1932), 101 L.J.P.C. 119, at p. 129 (the case of the decomposed snail being found in an opaque ginger beer

bottle): "I venture to say that in the branch of the law which deals with civil wrongs, dependent, in England at any rate, entirely upon the application by Judges of general principles—also formulated by Judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey, and the inherent adaptability of English law be unduly restricted. For this reason, it is very necessary in considering reported cases on the law of torts—that the actual decision alone should carry authority, proper weight, of course, being given to the *dicta* of the Judges." And as Lord Thankerton said at p. 139, "The English cases demonstrate how impossible it is to finally catalogue, amid the ever-varying types of human relationships, those relationships in which a duty to exercise care arises apart from contract, and each of these cases relates to its own set of circumstances, out of which it was claimed that the duty had arisen. In none of these cases were the circumstances identical with the present case. . . ."

So it seems to me, having in mind those statements and the decisions in *Cox v. Coulson* (*supra*) and other similar cases, that the *dictum* of Masten J.A. in the Reid case, unless the accent is on the word "in" in the above citation, unduly restricts the application of the principle in *Indermaur v. Dames*.

Now, to come back to the situation in the case at bar, William Hanes is the invitor, the infant plaintiff an invitee; Frank Hanes is the employee of William Hanes; he is carrying on his master's business, and, if he is guilty of any breach of duty to the plaintiff, that breach of duty is not only his, but is that of his employer. When the infant plaintiff came into that store he was entitled to assume that the occupier, through his employee, would use reasonable care to prevent damage from an unusual danger, of which he, the employee, knew, or ought to have known.

The defendant Frank Hanes knew that this young boy had brought the pistol into the store, a place where no such pistol should be, and where no customer would expect to find the same. He knew also what the pistol was like and its capacity and propensities—I am convinced. He also knew that this boy was flourishing the pistol around, and was charging it with air and firing it off in the presence of a young girl customer. Being familiar with fire-arms of this sort, he knew that a gun of this sort was a danger—actual or potential—to customers coming into

the store to do business. He knew, or ought to have known, that it is often, if not invariably, the supposedly unloaded pistol which does damage, and with all this he did not—in breach of his duty, I think, to protect the customer from an unusual danger—either order the boy out, or if he did order him out, see that his order was obeyed. It seems to me that the situation here is similar to that in the Cox case.

The recent case of *Kennedy et al. v. Union Estates Ltd.*, [1940] 1 D.L.R. 662, is a case where the plaintiff, an invitee or perhaps a licensee, sustained injuries by the collapse of a rotten bench in an amusement park. O'Halloran J.A., in the Court of Appeal of British Columbia in his judgment, seems to indicate that it is unnecessary to determine that the liability is dependent on the question whether a person is a licensee or invitee, but he discusses the problem involved in that case solely from the aspect of negligence. He says at p. 671:

"We have to determine if it (the defendant) committed a breach of any duty it owed the respondents. For as Lord Macmillan (with whom Lord Atkin and Lord Wright agreed) observed in *Shacklock v. Ethorpe, Ltd.*, [1939] 3 All E.R. 372, at p. 374:

"The word 'negligence' is tending in modern legal usage to be restricted to denote the breach of a duty owed to some other person'."

"Whether a duty exists in the particular case depends upon the relationship in which the parties stand to each other; vide *Lochgelly Iron & Coal Co. v. M'Mullan* (1933), 102 L.J.P.C. 123, . . . at p. 129, and . . . p. 131."

He then summarizes the relationships between the parties in the Kennedy case. Let us, proceeding along the same lines, summarize those relationships in the case at bar:

1. The infant plaintiff was lawfully in the store, and was undoubtedly in the highest possible position, namely, that of the invitee.

2. He was entitled to find in the store no unusual danger.

3. The air pistol in the hands of the young boy in my opinion was an unusual danger.

4. The adult defendant in charge of the store knew of the pistol being in the store and knew sufficient about the same to know that it was dangerous. Both he and his brother also knew that the infant defendant had carried air-guns and cap-

guns into the store before, but such visits were of a transitory nature.

5. The defendant Frank Hanes knew further that the boy was snapping off the gun in the manner described above before the plaintiff came in.

6. Frank Hanes knew, I am sure, and even if he could be said not to have known, he being used to fire-arms, ought to have known that such an air pistol in the hands of a young boy, who was flourishing it around in the manner described in the store, was liable to do damage to a customer.

7. The plaintiff was without negligence, as I find. He had some curiosity, but that would not amount to negligence.

On this summary of the relationship between the parties, what was the duty of the defendant, Frank Hanes, towards the plaintiff or towards any customer who should enter the store? Here was a boy (over whom he had control somewhat akin to that of a parent) in his store, in possession of a weapon which was dangerous or might become dangerous in his hands, and which he was charging and pointing in the store to which people were coming in and going from in the ordinary course of business. From the circumstances above set forth, did there not arise in the case of the defendant, Frank Hanes, both personally and as employee, a duty to see that this danger—actual or potential—was removed from the store, and not having done so, is he (and also through him his brother) not liable for the consequences of allowing such danger to remain and exist upon the premises? It seems to me that there was this duty to the public coming into the store, including the plaintiff, resting upon the party in charge of the store, and that the defendant, Frank Hanes, failed in that duty. It seems to me, therefore, that these two men are liable for the damage which happened to the plaintiff upon the premises, of which one was the occupier and the other had charge. To use the words of Bankes L.J. in *Cox v. Coulson*, at p. 191:

“The duty of the invitor is expressed in general terms by Buckley L.J. in *Norman v. Great Western Ry. Co.*, [1915] 1 K.B. 584, at p. 592 in these words: ‘The duty of the invitor towards the invitee is to use reasonable care to prevent damage from unusual danger which he knows or ought to know. If the danger is not such that he ought to know of it, his liability does not extend to it.’”

Frank Hanes the employee, I find, knew or ought to have known of this unusual danger. He failed in his duty to the infant plaintiff in not eliminating that danger with the result that the not unexpected damage was sustained by the plaintiff.

As to the infant defendant he is, of course, guilty of a tort against the infant plaintiff. His tort is certainly assault, and, I would think, also negligence. He is, therefore, liable also personally to the plaintiff for the results. If the statement of claim is not broad enough to include damages for assault on the part of the infant defendant, leave is given to the plaintiffs to amend accordingly.

At the hearing I was in doubt as to the propriety of proceeding without a guardian *ad litem* being appointed for the infant defendant, and, accordingly, I appointed the defendant, Frank Hanes, guardian *ad litem* for him. Such appointment, in view of the decision in *Straughan v. Smith* (1890), 19 O.R. 558, is probably unnecessary.

Leave also was sought by and granted to the plaintiffs to amend by adding the father as a plaintiff in the style of cause. That he was not so added was obviously a clerical error which should be corrected.

The three defendants are therefore liable to the plaintiffs for the damages sustained by them.

The father's net out-of-pocket disbursements for hospital bills, doctors and nursing are \$206. The boy will have to be fitted with a glass eye before long, and will have to have two or three glass eyes made for him in the first eighteen months, and after that will have to have annual changes over a period of time, and the burden of this during his minority will fall upon the father. I would allow another \$200 for this. Total damages to the father are \$406.

As to the boy's damages, no one can estimate the value of an eye. In addition to the great pain and suffering which was caused, this boy will be handicapped in many ways. His good looks, which were above average, will be impaired, because no matter how finely the artificial eye is made, he will never be the same in appearance as if he had the sight of both his eyes. As he grows older, he will always be the object of staring. He will have to take particular care of himself not only as to the care of the glass eye, which will be a great nuisance to him, but particularly as to objects coming at him from the right side. He will not be able to engage in certain types of games which

young people enjoy. He will also have to have a new artificial eye every year or two during his life which will entail considerable expense. He will have trouble in driving a car. He will be barred from active industrial employment, for most industrial plants now demand in their workmen the full sight of both eyes. If he goes to college, as is suggested, and studies for a profession, he will be handicapped by his appearance in professional life, and his success thereby greatly impaired. As a student, he will be unable to keep up long periods of study to the extent that he would otherwise have been able to do, as one eye is more likely to become fatigued than two. There is some compensation, to be sure, but I believe that no compensation can compensate for the loss of one eye, and, therefore, his efficiency as a student will be greatly impaired.

The bullet is still lodged in the bone at the back of the eye, in which place the doctors have decided to leave it rather than remove any more of the contents of the orbit. There is a possibility, though not a probability, that the bullet will give further trouble. There will be periodic headaches over the other eye, and, of course, if by any chance, the other eye should be lost, the result would be most disastrous.

So that any damages awarded cannot compensate for the loss of the eye, but must necessarily be substantial, and the least that I can award, having regard to all the circumstances, would be the sum of \$10,000 to the infant plaintiff.

Therefore, there must be judgment in favour of the plaintiffs, in the case of the father R. J. Kennedy for the sum of \$406, and in the case of the infant plaintiff Thomas W. J. Kennedy the sum of \$10,000 against all three defendants with one set of costs payable by the defendants to the plaintiffs after taxation thereof. The whole of the judgment of the infant plaintiff is to be paid into Court.

There will be 15 days' stay.

The defendants appealed to the Court of Appeal from the judgment of Urquhart J.

June 6th, 1940. The appeal was heard by ROBERTSON C.J.O., FISHER and HENDERSON JJ.A.

T. F. Forestell, K.C., for the defendant Carl Hanes, appellant.

R. B. Law, K.C., for the defendants Frank and William Hanes, appellants.

O. M. Walsh, K.C., for the plaintiffs, respondents.

July 3rd, 1940. ROBERTSON C.J.O.:—This is an appeal by the defendants from the judgment of Urquhart J., dated 18th March, 1940, after the trial of the action before him without a jury at Welland. The judgment awarded the infant plaintiff \$10,000 damages and his father, the other plaintiff, \$406, and the costs of the action against all the defendants.

The action arises from the loss of an eye by the infant plaintiff, he having been hit by a bullet from an air gun or pistol discharged by the appellant Carl Hanes.

The appellant William Hanes is a shopkeeper at Fort Erie; the appellant Frank Hanes is his brother, and is employed by him as a clerk in the shop; Carl Hanes is a boy of 16 years, a nephew of his co-defendants. He is an orphan and lives with his uncles and their unmarried sister in a house close to the shop of William Hanes.

A few weeks before the occurrence now in question, Carl Hanes had bought an air pistol. It is a rather efficient weapon, capable of doing serious injury. It discharges a small metal bullet through a rifled barrel. Air-pressure is supplied by a small hand-pump beneath the barrel, and the bullet is discharged by pressing the trigger. The air-pressure and, consequently, the velocity of the bullet is increased by operating the hand-pump repeatedly rather than once. It is said that with three or four operations of the pump the pressure is such that the bullet may kill a man. A brief inspection of the weapon is enough to convince one that it is highly dangerous if handled as a toy to play with.

Carl Hanes was very fond of his new weapon. In the few weeks he had had it he had used up most of the 500 bullets contained in one of the two boxes of bullets that came with the pistol. He had accomplished this, however, without doing much harm. There was a complaint that in play he had shot a small boy in the leg, but the facts in regard to this incident are involved in much doubt. His uncles, the co-defendants, had warned him mildly, and told him not to have the pistol about the shop.

On the afternoon of the accident, Carl Hanes had come into the shop from the rear with his air pistol. The shop was then in charge of his uncle Frank Hanes, William Hanes being engaged in mowing the lawn at the back. Carl Hanes went out in front of the shop and did a little shooting at the trees on the street. Frank Hanes was at the time engaged in sweeping off

the sidewalk, but he denies that he was aware of this shooting. Then a customer, a young girl, came, and Frank Hanes went into the store to wait upon her. Carl Hanes followed with his air pistol. While this girl was waiting to be supplied, Carl Hanes was pumping air into his pistol and discharging it, to show the girl the noise it made. Frank Hanes told him to take the pistol out of the shop, but the boy did not obey. While the girl customer was still there, the infant plaintiff came in. He is a boy a little younger than Carl Hanes and they were acquaintances. He had been sent in to the shop to buy some small article by his father, who waited for him in his motor-car at the door. The shop is a small place and all who were in it were of necessity within a few feet of one another. The boy Kennedy, seeing that Carl Hanes had something in his hand, asked him what he had there. Young Hanes replied that it was an air pistol, and proceeded to pump air into it, and pointing it towards young Kennedy, he pulled the trigger. The result was that a bullet lodged in Kennedy's eye, destroying it.

The learned trial Judge found all the defendants liable for the injury done the infant plaintiff, and the expense caused his father.

As to the infant defendant, I think it is unnecessary to discuss the grounds upon which liability has been found by the learned trial Judge. I desire to refer to only one matter upon which counsel for the infant defendant strongly relied. He said that the boy had brought the empty pistol into the store when he followed his uncle and the young girl customer in from the street. He said that the pistol had not been loaded in the store, and, in any event, that it had been discharged repeatedly in exhibiting it to the young girl while in the store, and that any bullet that may have been in it would, in the ordinary course, have been expelled. He further said that neither the young girl nor the infant plaintiff saw the pistol loaded in the store, and the infant defendant says that he did not put any bullet in it. No doubt there is evidence in support of each of these statements. The argument based upon them is that the infant defendant was justified in thinking that his pistol was not loaded, and it was, therefore, only innocent play and not negligence for him to discharge it while it was pointed at the infant plaintiff.

One thing that is certain in this case is that the pistol was loaded when it was discharged in the direction of the infant plaintiff. It is put forward as an explanation of this, consistent with the absence of negligence on the part of the infant defendant, that it may be that on the last occasion when the pistol was discharged in front of the shop, the bullet had not been expelled, and that it remained in the pistol throughout the exhibition of the pistol to the young girl. A dealer in guns, who was called as an expert on behalf of the plaintiffs, and who said that this air pistol was a dangerous weapon, gave some support to the theory that on the earlier occasions, after the bullet had been put in the pistol, there may not have been sufficient air pumped to provide the pressure necessary to expel the bullet, and that on the last occasion, when the infant plaintiff was shot, more air may have been pumped in. This theory does not appear to be supported by any experiment with the pistol, or any knowledge of a similar occurrence on the part of either the witness or Carl Hanes, and was based on the assumption that no bullet was put in the pistol after it was brought into the shop. Upon this basis it was argued on behalf of the infant defendant that he was justified, under the circumstances, in his certain belief that the pistol was unloaded when he pointed it in the direction of young Kennedy.

This is asking the Court to attach a good deal of weight to a mere theory, wholly untested, and supported only by the almost casual opinion of a witness given on his cross-examination. I am not prepared to assume—as this witness was asked to do—that the bullet had been in the pistol throughout its exhibition to the young girl. The boy was so accustomed to loading and discharging the pistol in his play that, having it in his hand, he might well have loaded it without thinking or remembering. The fact that neither the young girl nor Kennedy saw him put a bullet in after the last discharge before young Kennedy came into the store, means very little. It is not suggested that either one of them was closely observing him. There was probably a brief interval, as Kennedy entered, when no one observed Carl Hanes. Also there is no evidence, even of Carl Hanes, that he pumped in more air on the occasion of showing his pistol to the Kennedy boy than in the exhibition of it to the young girl. Guns in the hands of persons who are sure they are unloaded are too often the cause of injury. It is significant in this case that the boy who had handled the pistol so much

seems never to have had happen such an occurrence as is suggested in his defence. In my opinion the trial Judge was right in rejecting this contention of the defence.

With respect to the other defendants, the learned trial Judge applied the principle of *Indermaur v. Dames* (1867), L.R. 2 C.P. 311. His judgment contains a review of many cases that illustrate the principle, and I do not think it necessary to discuss them. In my opinion that principle was properly applied to the facts of this case.

That the infant plaintiff was in the shop as an invitee is not open to discussion. Young Hanes was not a mere intruder or accidental visitor. He was in and out of the shop at will. Living with his uncles and aunt close to the shop, he was made free of the premises and permitted to amuse himself there, and he availed himself of this license. His uncles knew that he had bought the air pistol, and that, like any boy with such a new possession, he was fond of using it. They also had some knowledge of its character as a weapon, and had warned the boy about the use of it. They say that the warnings were given because of the noise the pistol made when discharged, but, if they did not also appreciate and warn him in respect to the danger of careless use of the pistol, they did not exercise common sense.

On the occasion in question, Frank Hanes, who was in charge of the shop, must have known that his nephew had the pistol and that he was discharging it before young Kennedy entered. He says that he told Carl Hanes to take it outside, but he was at no pains to see that the boy obeyed. In my opinion there was such knowledge on the part of Frank Hanes of the danger of allowing his nephew to remain in the shop with his air pistol, that it amounted to permitting on the premises a danger known to him to exist, and to this danger anyone entering the shop was unwittingly exposed.

Upon this ground I think Frank Hanes is liable for the consequences of his negligence. He was the servant of his brother, William Hanes, for whom he was in charge of the shop at the time, and as his employer William Hanes is likewise, in my opinion, responsible.

The question of the amount of the damages awarded requires consideration. The learned trial Judge awarded the infant plaintiff \$10,000 damages. There is, of course, no fixed scale by which the damages can be assessed, and no one can name an arbitrary figure and say that is the right amount. The learned

trial Judge has properly mentioned a number of important considerations that indicate the serious consequences of the loss of an eye, and I see no reason to quarrel with any of these. I venture to think, however, that he has not sufficiently considered the chance that this plaintiff, like everyone else, is always exposed to, that by illness or accident his career may be cut short long before he has suffered all the evil consequences contemplated by the learned trial Judge. It is fair also to consider that a substantial sum of money available while the boy is young may be the means of providing him with educational and perhaps other advantages that otherwise he might not have. I would, therefore, reduce the amount of damages awarded by the trial Judge to the infant plaintiff to \$5,000. In all other respects the appeal should be dismissed and the respondents are entitled to the costs of the appeal.

HENDERSON J.A.:—I have had the privilege of reading the opinion of my Lord the Chief Justice.

The case is one which has given me a good deal of difficulty in arriving at a conclusion. I have no doubt as to the liability of the infant defendant, and with some hesitation I reach the same conclusion as my Lord the Chief Justice as to the other defendants.

I am in entire agreement with his disposition of the question of damages.

FISHER J.A. (dissenting)—This action, based on negligence, and out of which this appeal by the defendants from the judgment of Urquhart J. has arisen, has to do with an accident resulting in the infant plaintiff losing his eye. It is another case of pointing a gun and firing, fully believing it was not loaded. The learned Judge, on the facts, applied the principles laid down in *Indermaur v. Dames* (1866), L.R. 1 C.P. 274 and L.R. 2 C.P. 311, and the long line of cases supporting that decision, and awarded the infant plaintiff \$10,000 damages and his father, the other plaintiff, \$406.

Very shortly the relevant facts are as follows: The defendant, William Hanes, was the owner of and carried on a small mercantile and general store business. The defendant Frank Hanes was an employee. The infant defendant Carl is a boy sixteen years of age, and a nephew of his co-defendants, and lived with them. Carl had purchased an air pistol some weeks before the occurrence in question, and by pulling the trigger it discharges, through air-

pressure, small metal bullets, through a rifle barrel. There is no question that the gun is a dangerous one if not properly handled. It was stated that Carl had, prior to the accident, used as many as 500 bullets without any accident happening. On the day in question, and after Carl had shot the gun off several times outside the shop, he entered the shop with his gun, and was pumping air into it and discharging it to show a customer who had entered the shop the noise it made. Frank Hanes was busy waiting on this customer, and, at that time, the infant plaintiff, who was an acquaintance of Carl Hanes, entered the shop to make a purchase. The infant plaintiff, seeing Carl, got into conversation with him and observed that he had the air pistol in his hands. While looking at it the infant defendant proceeded to pump air into it, and then pointed it at the infant plaintiff and pulled the trigger, resulting in a bullet striking the infant plaintiff in the eye and destroying it. The defendant Frank Hanes was at this time busy waiting on a customer and told the boy to stop and leave the shop with his gun as he was making too much noise with it.

No one suggests that the shooting was wilful, and, as I have stated, it appears to be one more instance of pointing a gun at another and pulling the trigger, believing that it was not loaded. Carl states that he had shot out all the bullets before he entered the shop and that he had not loaded it in the shop and had discharged it repeatedly in exhibiting it to the young girl customer, and that any bullets that may have been in it would have been expelled. The only explanation that can be given for the bullet being in the pistol at the time it was discharged and the bullet entering the infant plaintiff's eye is that the bullet must have been in the gun when he entered the store and remained in the gun during the period the infant defendant was exhibiting and operating it in the presence of the girl customer, and also that there might not have been sufficient air pumped into it to provide sufficient pressure to expel the bullet.

The defendant William Hanes was not in the shop at the time of the shooting and did not know that Carl was there with his gun.

The foregoing is, I think, a fair statement of the relevant facts. No one contends that the infant plaintiff was not an invitee and as such was entitled when he entered the shop to believe that proper care had been taken to safe-guard him against unusual dangers known, or which should have been known, by the adult

defendants. The duty and responsibility in this case, as I understand it, is not grounded on the right of the infant defendant to own and have possession of an air-gun, but upon the ground that the uncles (the co-defendants) were negligent in not taking care that their nephew would use the gun in a careful manner. My difficulty is to discover wherein the two adult defendants, or either of them, have failed to do what the law required of them. To hold that the adult defendants were negligent and careless and therefore liable in not anticipating that the nephew might do harm to some third party, either in or outside of the shop, would necessitate holding that Carl should never have had possession of the gun unless they were present at all times when it was being used, so as to safe-guard him against the negligent use of it, and doing harm to others.

My view is that the nephew was entitled to possession and use of the gun and had, as stated, used it to the knowledge of the adult defendants for a considerable time without mishap, and that, in such circumstances, the adult defendants were not bound to anticipate he would load his gun and point it at anyone, knowing that it contained a bullet.

The unusual danger against which the plaintiff was entitled to be protected was, in this case, the danger of Carl loading the gun and firing it at the plaintiff, or any other invitee, and there is no suggestion in the evidence that this was a danger of which the defendant William Hanes, or his employee, knew, and also there is no suggestion that they had any reason to anticipate that such a thing would occur; and the cause of the accident was not an unusual danger of which the defendants knew or ought to have known. The principle of *Indermaur v. Dames* (*supra*) is not applicable. While it is regrettable that the infant plaintiff has suffered so severely, my opinion is that it would be placing a too high standard of care to find that the adult defendants, or either of them, were negligent, and that the accident must be viewed as an unavoidable one. If I am wrong in my conclusion, I entirely agree with my Lord the Chief Justice that the damages awarded the infant plaintiff should be reduced from \$10,000 to \$5,000.

I would allow the appeal with costs and dismiss the action with costs.

Damages awarded to infant plaintiff reduced to \$5,000, otherwise appeal dismissed with costs, FISHER J.A., who would allow the appeal with costs and dismiss the action with costs, dissenting.

[COURT OF APPEAL.]

Commissioner of Agricultural Loans v. Irwin.

Contracts—Contract for sale and purchase of lands—Proviso that contract to be void if lands redeemed from tax sale—Right of party to contract to take advantage of proviso after redemption from tax sale by such party—Threat by another to redeem—Protection of interest—Acquisition of separate right of redemption—Scope of implication that party to contract would not redeem.

A stipulation in a contract that it shall be void in a certain event is to be construed subject to the principle of law that a party shall not take advantage of an event brought about by his own act or omission. This is a principle of general application and is subject to no exception and is not confined to a situation where the act or omission of the person seeking to take advantage of the stipulation constitutes a breach of the contract: *New Zealand Shipping Company Limited v. Societe des Ateliers et Chantiers de France*, [1919] A.C. 1, considered.

AN action to recover moneys alleged to be due and owing under a contract between the parties.

March 19th, 1940. The action was tried by ROSE C.J.H.C. without a jury at Toronto.

J. J. Robinette, for the plaintiff.

J. S. Duggan, for the defendant.

ROSE C.J.H.C. (delivered orally at the conclusion of the trial):—The case is not free from doubt, but on the whole I think the plaintiff is entitled to succeed.

The state of affairs at the time of the contract was that the defendant had become the purchaser at a tax sale, so that unless the land was redeemed by Mrs. Might, who was the holder of the first charge, or by the plaintiff, who was the holder of the second, or by someone else who was the holder of a small third charge, she would in due time become the owner, and all the holders of charges, including the plaintiff, would be out of the way. Mrs. Might was asserting a considerable claim; if the plaintiff redeemed that would get rid of the defendant, but it would leave Mrs. Might with her considerable claim in a position prior to that of the plaintiff, so there was no apparent reason why the plaintiff should redeem, and the other course, of buying the defendant's right, was adopted. The defendant fixed the price of what she had to sell, and the plaintiff agreed to that price. Of course, if anyone redeemed the defendant would have nothing to convey to the plaintiff, and, for the reason that has been stated, it could hardly have been in contemplation that the plaintiff himself would have been

desirous of redeeming and putting Mrs. Might in the favourable position that redemption by the plaintiff would have brought about; but no one knew, as far as the evidence goes, what Mrs. Might was likely to do, and so the obvious thing to do was to insert in the document executed between the plaintiff and the defendant a condition which would relieve the plaintiff from the obligation of paying \$3,000.00 to the defendant for nothing if Mrs. Might did exercise her right to redeem. But the clause was not in its terms confined to a redemption by Mrs. Might; the recitals were quite general; they expressed the desire of the plaintiff to purchase provided the land was not redeemed, and the agreement of the vendor to sell in case the land was not redeemed, and then, after the operative words expressive of a conveyance by the defendant of what she had to convey, there is the covenant which gives effect to the recitals, and it is that if the lands are redeemed the agreement shall be null and void and of no effect and the defendant shall repay any money paid by the plaintiff under the contract.

I quite agree that if matters had stood as they then were and the plaintiff had repented himself of his bargain it would not have been open to him to get out of it by redeeming and setting up the condition; that is to say, he could not, matters being as they were at that time, have redeemed and have said successfully that it had happened that the lands had been redeemed and therefore that the agreement was null and void and of no effect.

There are many cases which show that he could not successfully have taken that position. The case cited by Mr. Duggan—*New Zealand Shipping Company v. Societe des Ateliers* (1918), 34 Times Law Reports 400—is a good example. It is a decision of the House of Lords, and the Lord Chancellor, whose judgment is the only judgment reported, refers to a good many of the earlier cases, and states the rule quite broadly. The earlier cases, or a good many of the earlier cases, are cases of the type in which there is a stipulation that if purchase money is not paid by a certain day the contract shall be null and void, in which cases it has always been held, I think—but if not always, over and over again—that the purchaser cannot get the advantage of that stipulation by refraining from paying the purchase money; the stipulation is a stipulation, as it is put sometimes, inserted for the benefit of the vendor, to be enforced or not to be

enforced as he sees fit, and sometimes it is put on the ground that the purchaser cannot take advantage of his own wrong, the wrong of refusing to pay the money which he had contracted to pay. But the Lord Chancellor states the principle rather more broadly than that. He discusses the terms of the contract that was before the House in the particular case. The contract provided for the case of the inability of the vendor to deliver the ship which was the subject matter of the contract. The inability, as the Lord Chancellor pointed out, might be due to failure on the part of the builder to proceed with the construction with due diligence, in which case the builder could not claim release from the contract under the clause; on the other hand, the inability might be the result of causes beyond the control of the builder, for which he was not, under the terms of the contract, to be held liable. It was a principle, the Lord Chancellor said, of the law that no one could in such case take advantage of the existence of a state of things which he himself produced; that is to say, if the builder by reason of his own lack of diligence became unable to complete the ship within the stipulated time he could not get out of his obligation to complete by saying that the contract provided that in the case of inability to complete the contract should be null and void. That is the case with which the Lord Chancellor was dealing, and we have not his precise words and do not know how the other noble lords put it, but I doubt whether it was intended to state the rule in such broad terms as to make it apply to the case with which I am dealing at the moment.

As I have said, I quite agree that, had matters stood as they were at the time of the contract, the plaintiff could not have got out of his contract by redeeming; but matters did not stand in that state. The first encumbrancer, Mrs. Might, became active; her solicitor came to the Commissioner, announced his intention of redeeming, and spoke of bringing an action for a declaration that the price paid for redemption would be a first charge upon the land; whether he could have succeeded in such a contention is a matter of no moment here and need not be considered, but, at any rate, Mrs. Might in order to redeem would have had to borrow the money, and the solicitor was asserting an intention of bringing an action for a declaration of Mrs. Might's right to redeem and of her right to make that redemption money stand as a charge prior to the

Commissioner's charge. The Commissioner was in a difficulty: if Mrs. Might went on and redeemed and if her claim was as large as she said it was, true, the Commissioner would not have to carry out his bargain with the defendant, but he would have ahead of him as an encumbrancer Mrs. Might with the large claim that she was asserting, and possibly added to it the cost of redemption; so, finding himself in that difficulty, he accepted an offer made on behalf of Mrs. Might to sell all her rights for \$3,000.00, and the document (Exhibit 5) was executed. The Commissioner now found himself possessed, I should think, of Mrs. Might's right to redeem. What he acquired from her by grant, release and quit claim was all her estate, right, title, interest, claim and demand in, to or out of the lands, so that it was now the Commissioner's interest to do exactly what the parties at the time of the transaction between the plaintiff and the defendant must have had in contemplation as something that Mrs. Might was likely to do—that is to say, to redeem—and the Commissioner did redeem. Redeeming in those circumstances, not committing any wrong as between himself and the defendant, not doing anything that he had contracted not to do, but simply doing something which, by reason of having acquired Mrs. Might's position, it was his interest to do, and the defendant as a result of his doing that being left with nothing to convey in case the Commissioner paid her the money that was provided for by the contract between him and her, I see no reason why the Court should give a restricted meaning to the wide and general words of clause 7 of the contract. To repeat, those words are that if it should happen and in the event that the lands are redeemed from the tax sale the agreement shall be null and void and of no effect, and the money, if any, paid shall be repaid. The lands are redeemed, the defendant has nothing that she could convey if the plaintiff were made to pay the money for which she is asking, and she is in that position, not because the plaintiff, capriciously and for the protection merely of the interest which he had at the time of the contract, has chosen to redeem, but because the plaintiff, in the new circumstances created by his acquisition of Mrs. Might's position, has found it necessary to protect himself by redeeming.

For those reasons I think, as has been indicated already, the plaintiff is entitled to succeed in his claim for the return of the \$200.00, and the defendant's counterclaim must be dis-

missed. The claim, of course, is a small claim, but counsel have informed me that the action, whether begun in this Court originally or begun in the County Court, was bound to get into this Court because of the large claim that the defendant was setting up, and it is quite apparent that this is the Court in which the matter ought to have been disposed of, so the costs, I think, ought to be on the scale of this Court's tariff.

The defendant appealed to the Court of Appeal from the judgment of Rose C.J.H.C.

September 12th, 1940. The appeal was heard by RIDDELL, HENDERSON and McTAGUE JJ.A.

J. S. Duggan, for the defendant, appellant.

J. J. Robinette, for the plaintiff, respondent.

September 27th, 1940. McTAGUE J.A.—By indenture dated the 15th day of November, 1930, the plaintiff's predecessor in title, The Agricultural Development Board, took a mortgage from one Aubrey Might on certain farm lands in the Township of Toronto, in the County of Peel to secure a loan of \$6,900.00. At the time of the mortgage, the lands apparently were subject to an annuity of \$60.00 monthly in favour of one Jemima A. Might—a prior charge. After the execution of the mortgage the annuity became in arrears of upwards of \$6,000.00. In addition the mortgagor failed to pay municipal taxes and the lands were put up for sale. The defendant became the tax sale purchaser on the 22nd day of June, 1938, for the sum of \$1,299.10.

After defendant obtained a tax sale certificate negotiations were entered into between plaintiff and defendant culminating in an agreement in writing dated 22nd day of August, 1938. By this agreement the Commissioner agreed to purchase the lands from the defendant at the price of \$3,000.00, of which \$200.00 was paid as a deposit, the balance to be paid upon the defendant obtaining a tax deed and conveying to the Commissioner. The agreement contained a special proviso in the following terms:

"The parties hereto mutually covenant and agree that if it should happen and in the event that the said lands are redeemed from the hereinbefore mentioned Tax Sale under and by virtue of the provisions of the Assessment Act, then and in that event, this agreement shall be null and void and of no effect, and in

such case the Vendor covenants and agrees to repay to the Commissioner without interest, any sum or sums of money received by him hereunder."

During the period when the right to redeem was still running the solicitor for the annuitant Jemima A. Might, entered into negotiations with the Commissioner threatening to redeem. As a result the Commissioner obtained a release from the annuitant dated the 16th day of May, 1939, of all her interest in the lands for the sum of \$3,000.00. After this sum had been paid the Commissioner then proceeded to exercise his right of redemption in spite of his prior agreement with the defendant.

This action was then commenced by the Commissioner to recover from the defendant the sum of \$200.00 paid as a deposit at the time of executing the agreement dated the 22nd day of August, 1938, pursuant to the proviso above quoted. The defendant denied liability and counterclaimed for \$1,370.99, the difference between the purchase price of \$3,000.00 and what she received as the redemption price, plus the \$200.00 deposit paid by the Commissioner under the agreement. The action was tried by the Honourable the Chief Justice of the High Court, and at the conclusion of argument on the 19th day of March, 1940, the learned Chief Justice gave judgment in favour of the plaintiff and dismissed the counterclaim. From this judgment the defendant appeals.

The whole question depends upon what is the proper interpretation to be given to the proviso already referred to, "that if it should happen and in the event that the said lands are redeemed from the hereinbefore mentioned Tax Sale under and by virtue of the provisions of the Assessment Act, then and in that event this agreement shall be null and void and of no effect" etc.

The latest authoritative statement of the law on the subject appears to have been laid down by the House of Lords in *New Zealand Shipping Co. Ltd. v. Societe des Ateliers et Chantiers de France*, [1919] A.C. 1. Part of the head note reads as follows:

"A stipulation in a contract that it shall be void in a certain event is to be construed according to its natural meaning, subject to the principle of law that a party shall not take advantage of his own wrong or, *semble*, of an event brought about by his own act or omission." While Mr. Robinette is disposed to quarrel with the latter part of the note and limit

the operation of the principle to cases of taking advantage of a wrong in the very narrow sense, I see no good reason for adopting his view. As the Lord Chancellor points out in the *New Zealand Shipping Company* case, it is a very old principle of law illustrated in such cases as *Roberts v. Wyatt* (1810), 2 Taunt. 268, 276, and *Rede v. Farr* (1817), 6 M. & S. 121, 124. In Lord Ellenborough's judgment in the latter case is to be found the following:

"In Co. Litt. 206b it is laid down: 'If a man make a feoffment in fee, upon condition that the feoffee shall re-infeoff him before such a day, and before the day the feoffor disseise the feoffee, and hold him out by force until the day be past, the state of the feoffee is absolute; for the feoffor is the cause wherefore the condition cannot be performed, and therefore shall never take advantage for non-performance thereof. And so it is if A. be bound to B. that J. S. shall marry Jane G. before such a day, and before the day B. marry with Jane, he shall never take advantage of the bond, for that he himself is the mean that the condition could not be performed. And this is regularly true in all cases.' "

Mr. Robinette endeavours to take consolation in the proposition that there is nothing in the proviso prohibiting the Commissioner from redeeming. My own view is that that is far from enough. If there is not in plain language a specific right given to the Commissioner to bring about the event, then the principle of law applies and he cannot by his own act avoid the condition.

I should not have thought that there was any exception to this general principle. In his reasons for judgment, the learned Chief Justice seemed to feel that, while the general principle obtained, it should not apply here because after the contract had been entered into the Commissioner by acquiring Mrs. Might's interest had got a new right to redeem, and that took the matter out of the general principle. I must confess with respect that I am unable to see that that makes any difference. No matter when or how the Commissioner acquired the right to redeem the fact is that by his own act he brought about the event which he now seeks to take advantage of. That he cannot be permitted to do because the contract does not specifically give him such a right.

The case of *In re Meyrick's Settlement*, *Meyrick v. Meyrick*, [1921] 1 Ch. 311, put forward by Mr. Robinette to explain the *New Zealand Shipping Company* case seems to me to be quite in accord with the part of the head note already quoted in that case, and also with the principles laid down in the older cases. In the *Meyrick* case the proviso in the agreement making it conditional upon either party not taking legal proceedings for divorce plainly contemplated that either party had the right to take such proceedings. In the contract in question in the case at bar no such intention is suggested and the general legal principle should govern.

Accordingly, I should allow the appeal with costs and dismiss the action with costs, the defendant to have judgment on her counterclaim with costs.

HENDERSON J.A. agreed with McTague J.A.

RIDDELL J.A. (dissenting):—This is an appeal from the judgment of the learned Chief Justice of the High Court, delivered after a trial before him without a jury. I have read and re-read the reasons for judgment and the evidence; and, rather changing the view tentatively taken at the hearing of the appeal, I am now clearly of the opinion that His Lordship was right in the conclusions arrived at, and think that the appeal should be dismissed with costs on the High Court scale.

In nothing I have said I am to be considered as casting any doubt upon the well-settled law laid down in many cases as, e.g., in the case of *New Zealand Shipping Company, Limited v. Societe des Ateliers et Chantiers de France*, [1919] A.C. 1, by the House of Lords:

“A stipulation in a contract that it shall be void in a certain event is . . . subject to the principle of law that a party shall not take advantage of his own wrong or, *semble*, of an event brought about by his own act or omission.”

I am of opinion, however, that if this act or omission of the party is, in effect, forced upon him, say for his own protection, it is not to be considered wrongful quoad the other party, and is therefore not effective to enable the other party to claim non-avoidance.

Appeal allowed with costs, RIDDELL J.A. dissenting.

[COURT OF APPEAL.]

Re Grossi.

Wills—Interpretation—Pecuniary legacies—Whether pecuniary legacies charged on real estate—Residuary bequest of personalty—Whether real estate and personal estate blended in one mass.

The testator by his will bequeathed certain pecuniary legacies to his nephews and nieces living at his death and directed that if any of such nephews or nieces should die before attaining the age of twenty-one years then the legacy to such nephew or niece should lapse and fall into the residue of his estate. Then, by paragraph 9 of his will, the testator directed as follows:

"I give, devise and bequeath all my real property and all the rest, residue and remainder of my personal estate of whatsoever nature and kind and wheresoever situate unto my wife Louise Grossi to be hers absolutely."

In the administration of the estate the question arose whether the pecuniary legacies should be paid out of the real estate, there not being sufficient personalty to pay the legacies.

Held, by the Court of Appeal, reversing the judgment of Rose C.J.H.C., Gillanders J.A. dissenting, that in paragraph 9 the testator had made a clear distinction between his real and his personal estate and he had devised all his real estate and then the residue of his personal estate to his widow, and that therefore the legacies were not payable out of the real estate. The testator by his will did not indicate an intention to constitute his real estate and his personal estate one mass. There was a clear gift to the widow of all the testator's real estate and there is no evidence of an intention to have the gift of real estate to his widow cut down in aid of the legacies bequeathed to his nephews and nieces: *Greville v. Browne* (1859), 7 H.L.C. 689, distinguished.

A MOTION by Florence Madeline Grossi and Albert Anthony Grossi for an order determining certain questions arising under the will of Arthur J. Grossi, deceased, and for the appointment of a co-trustee.

The motion was heard by ROSE C.J.H.C. in Weekly Court at Toronto.

J. F. Coughlin, K.C., for Florence Madeline Grossi and Albert Anthony Grossi, two adult legatees.

N. D. Tytler, for Louise Grossi and for The Carmelite Sisters of Canada.

J. L. G. Keogh, for the Sisters of St. Joseph.

J. G. Middleton, for the Hospital for Sick Children.

P. D. Wilson, K.C., Official Guardian, for six infant legatees.

No one for the Parish Priest in charge of the Church of St. Vincent de Paul, although duly notified.

July 4th, 1940. ROSE C.J.H.C.:—This is a motion launched by two legatees for the determination by the Court of certain questions arising under the will of Arthur J. Grossi, deceased,

and for the appointment of a Trust Company to act as co-trustee with the testator's widow, the sole executrix.

The testator died in July, 1938, leaving an estate of considerable value, composed in great part of a number of parcels of real estate, some encumbered and some unencumbered, and moneys secured by mortgage. By his will, after the appointment of his wife to be sole executrix, he gave certain pecuniary charitable legacies and made specific bequests of certain articles. Then, by clause 7, he bequeathed a legacy of \$4,000.00 to each of his nephews and nieces living at his decease, the children of one or another of certain named brothers, each of such nephews or nieces to receive his or her legacy together with the accumulated income thereon upon arriving at the age of 21 years, and he said: "If any of my said nephews or nieces shall be under the age of twenty-one years at the date of my death, my said trustee [*i.e.*, his widow, the executrix] shall retain out of my estate and set aside and invest the amount of said legacies, and pay the legacy . . . together with the accumulated income thereon, as and when each of such nephews or nieces shall attain the age of twenty-one years, but if any of such nephews or nieces shall die before attaining the age of twenty-one years then the legacy to such nephew or niece who shall not live to attain the age of twenty-one years shall lapse and fall into the residue of my estate." Then by clause 8, in addition to the above legacies, he bequeathed a prize of \$1,000.00 to each of the nephews and nieces already mentioned who, before attaining the age of twenty-five years, should pass a certain examination at a university, and he directed his "said trustee" on his decease to set aside in a separate fund a sufficient sum to provide for all prospective prizes or rewards under this paragraph of his will, and he directed further that the amount of each prospective prize or reward which should not have been earned or gained by any nephew or niece who should have attained the age of 25 years should fall into the residue of his estate. Then he said, in clause 9, "I give, devise and bequeath all my real estate and all the rest, residue and remainder of my personal estate of whatsoever nature and kind wheresoever situate unto my wife Louise Grossi to be hers absolutely."

The testator's personal estate is or may be insufficient for the payment in full of his debts, the charitable bequests, the several legacies of \$4,000.00 each, and the prizes; and the principal question to be determined is whether by clause 9 the real

estate devised to the widow must be resorted to for the payment of the deficiency, or, in other words, whether the clause is a residuary clause in the sense that all the property passing under it, both the real estate and the "rest, residue and remainder" of the personal estate, is to be treated as residue.

In *Greville v. Browne* (1859), 7 H.L.C. 689, it was stated by Lord Campbell L.C. that "For nearly a century and a half this rule has been laid down and acted upon, that if there is a general gift of legacies, and then the testator gives the rest and residue of his property, real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass; that part of that mass is represented by legacies, and that what is afterwards given, is given minus what has been before given, and therefore given subject to the prior gift." This decision has been applied in very many later cases, but some of those later cases go to show that a clause couched in terms similar to those of clause 9 of the will here under consideration is not sufficient of itself to bring the rule into operation. Thus in *Wells v. Row* (1879), 48 L.J. Ch. 476, 40 L.T.N.S. 715, where, subject to the payment of funeral and testamentary expenses and debts and certain specified legacies, the testator had devised all his real estate and bequeathed all the residue of his personal estate to trustees for a niece, Fry J. thought that there was a substantial difference between the language of the will and that of the will in *Greville v. Browne* in that the testator in *Wells v. Row* had distinguished between his real estate and the residue of his personal estate. Therefore he thought that the ordinary rule must prevail, and that the personal estate was primarily liable in exoneration of the real estate. Similarly, in *James v. Jones* (1882), 9 L.R. Ir. 489, where the testator had drawn the same distinction, the Vice-Chancellor thought that the case fell within the principle of *Wells v. Row* and that the principle of *Greville v. Browne* was excluded, and that the distinction taken afforded a strong argument against the contention, based upon other parts of the will, that the debts and legacies had been charged upon the real estate. On the other hand, as was stated by Keke-wich J. in *In re Bawden*, [1894] 1 Ch. 693, the principle in *Greville v. Browne* may be applicable to cases in which the testator has not used expressions such as the "rest and residue", or even the "rest" or the "residue". "What is meant is that if he has blended the whole of it in one mass, that is evidence of an

intention that the legacies shall come out of that mass, which is only formed, in its ultimate and concrete shape, after the deduction of those legacies"; and my opinion of the present case is that, while clause 9, standing by itself, might not suffice to establish the residuary nature of the devise of the lands to the testator's widow, the will as a whole does establish the fact that it was the testator's intention that the devise should be a residuary devise.

In *In re Bawden*, Kekewich J. said, quoting the language of Lindley L.J. in *In re Morgan*, [1893] 3 Ch. 228: "I do not see why, if we can tell what a man intends, and can give effect to his intention as expressed, we should be driven out of it by other cases or decisions in other cases . . . Many years ago the Courts slid into the bad habit of deciding one will by the previous decisions upon other wills. Of course there are principles of law which are to be applied to all wills; but if you once get at a man's intention, and there is no law to prevent you from giving it effect, effect ought to be given to it." Now I think that in the present case the intention is made reasonably clear when certain words to be found in clauses 7 and 8 of the will are read with clause 9. There is in the will no direction to the executrix to pay the charitable legacies out of the estate or out of any particular part of the estate. But when you come to clause 7, which deals with the legacies to the nephews and nieces, you find that the testator says "My said trustee shall retain out of my estate and set aside and invest the amount of said legacies," and if any of the legatees shall die before attaining the age of 21 years his or her legacy "shall lapse and fall into the residue of my estate;" and when you come to clause 8 you find that if any prize or reward shall lapse it also shall "fall into the residue of my estate." This, to my mind, is a clear recognition by the testator of the fact that there is to be a residue of his estate of which he intends to dispose; and when you find that there is no disposition of residue except in clause 9, I think you have a strong indication of the fact that he looked upon clause 9 as a disposition of the residue not only of his personal estate but of his estate generally. Moreover, the testator, having made certain specific bequests, had not, when he came to clause 9, the whole of his personal property at his disposition; but his real property was intact; and, in those circumstances, it is reasonable, I think, to read clause 9 as

saying, in effect, "I give to my wife all my real estate and all my personal estate except the chattels of which I have made specific bequests," rather than to read it, as counsel for the widow would do, as saying, in effect, "I give to my wife all my real estate and what may remain of my personal estate after payment out of it of my pecuniary bequests and the handing over of the articles that I have bequeathed specifically." Had the intention been to distinguish between the realty and the residue of the personalty as the fund out of which the pecuniary legacies were to come, one would have expected either to find what is now in clause 9 split up into two separate clauses, or to find, instead of the direction in clause 7 to retain the amount of the legacies out of the estate, a direction to retain the amount out of the personal estate, and in clauses 7 and 8, instead of the direction that a lapsed legacy or prize should fall into the residue of the estate, a direction that it should fall into the residue of the personal estate. It seems to be reasonably clear that when the testator was directing that the legacies to the nephews and nieces should be retained out of his estate and that any that lapsed should fall into the residue of his estate, he had not in contemplation anything like such a specific devise of his real estate as would result in the setting up of the personalty as the sole source for the payment of legacies. The cases in which a gift has been held to be residuary, even when the testator has not described it as such, are numerous—*Trewby v. Balls*, [1909] 1 Ch. 791, may be mentioned as being one of them decided later than *In re Bawden*—and I think that this is one of the instances in which that course is to be followed in the attempt to give effect to the intention indicated by the will read as a whole.

Another question raised by the originating notice of motion was whether the legacies of \$4,000.00 each given by clause 7 were cut down to legacies of \$1,000.00 each by some words to be found in the latter part of the clause. Counsel for all persons represented seemed to agree that the last mentioned words were merely a false description; and it was decided that the legacies were legacies of \$4,000.00 each. This, together with what I have said upon the principal question argued, answers all the questions submitted except the second, which is whether the legatees referred to in paragraph 8 are entitled to the setting up of a separate fund sufficient to provide for all prospective

prizes or rewards. As to this, the will is explicit; and I think that the fund must be set up as soon as it can be set up in due course of administration of the estate.

The motion for the appointment of a Trust Company to act with the executrix as a co-trustee was supported by several of the beneficiaries, but it is not, I think, a motion that ought to prevail. I do not think that the evidence establishes any case of maladministration; and while the executrix, so long as she held the view that the real estate could not be resorted to for payment of legacies, was, perhaps, tempted to pay out of pure personalty certain charges which ought to have been charges upon the realty, I do not think that it is shown that, now that it has been decided that the real estate can be resorted to for the payment of legacies, there is any reason why she should not be left in the sole management of the estate, which she seems to be competent to manage. She is the person chosen by the testator; and it would be high-handed and, I think, improper on the part of the Court, at the instance of some beneficiaries and without real reason, to insist that some other person should share her responsibility. That part of the motion will be dismissed.

The costs of all persons represented on the motion ought to be paid out of the estate, those of the executrix being taxed as between solicitor and client. It was proper that the questions raised as to the effect of the will should be brought before the Court for determination, and, while perhaps it would be logical to order the applicants to pay such part of the executrix's costs as are peculiarly referable to the motion for the appointment of an additional trustee, there would be practical difficulties in distinguishing that part, and I think it is not unreasonable to abstain from any attempt to distinguish.

Louise H. Grossi appealed to the Court of Appeal from the order of Rose C.J.H.C.

October 22nd and 23rd, 1940. The appeal was heard by RIDDELL, HENDERSON and GILLANDERS JJ.A.

D. L. McCarthy, K.C., and *N. D. Tytler*, for Louise H. Grossi, appellant.

N. D. Tytler, for The Carmelite Sisters of Canada.

J. F. Coughlin, K.C., and *A. M. Matheson*, for Florence M. Grossi and Albert A. Grossi, adult legatees.

J. L. G. Keogh, for the Sisters of St. Joseph.

P. D. Wilson, K.C., Official Guardian, for six infant legatees.

November 4th, 1940. RIDDELL J.A.:—This is an appeal from the judgment of the learned Chief Justice of the High Court in the interpretation of the will of the late Arthur J. Grossi. The sole point with which we are concerned is whether certain legacies are to be paid in part out of the realty.

The facts are set out in sufficient clearness in the careful and learned reasons for judgment of the Chief Justice—the important clause in the will reads:

“9. I give, devise and bequeath all my real estate and all the rest, residue and remainder of my personal estate of whatsoever nature and kind and wheresoever situate unto my wife Louise Grossi to be hers absolutely.”

It is plain and elementary law that legacies are to be a charge upon personal estate, and that real estate is only secondarily liable, unless there is something in the will indicating a contrary interpretation.

The learned Chief Justice has come to the conclusion that clause 9 indicates an intention to make one fund of the real estate and the personal estate; and, undoubtedly some of the cases cited by him would fairly justify such a conclusion; and this is somewhat strengthened by other passages in the will. But in the absence of binding and conclusive authority, I think that the testator made a clear distinction between his real and his personal estate, and that he devised (1) all his real estate and then (2) the residue of his personal estate to his widow.

I think that *Greville v. Browne* (1859), 7 H.L.C. 689 is not applicable, but rather such cases as *Wells v. Row* (1879), 48 L.J. Ch. 476, and would allow the appeal with costs of the widow here and below out of the estate. As a rule, the Official Guardian has his costs out of the estate, but here he has joined hands with the respondents, instead of simply submitting everything to the Court.

HENDERSON J.A.:—This is an appeal from the order of Rose C.J.H.C., of July 4th, 1940, upon an application before him under originating notice for the construction of the will of Arthur J. Grossi, deceased, and for the appointment of a Trust Company to act with the executrix.

The facts are set forth in the written reasons for judgment of the learned Chief Justice, and need not be repeated here.

The learned Chief Justice thought that the construction of the will was governed by the case of *Greville v. Browne* (1859), 7 H.L. Cas. 689, and distinguished it from the principle adopted in *Wells v. Row* (1879), 48 L.J. Ch. 476; 40 L.T. N.S. 715, and *James v. Jones* (1882), 9 L.R. Ir. 489, and held that the real estate of the deceased, and the personal estate, were to be treated as one mass and charged with the legacies named in the will.

With great respect I am unable to reach the same conclusion as the learned Chief Justice.

The will falls to be construed upon its terms, and they appear to me to be plain and without ambiguity. Of course I agree that the will is to be construed according to its entire contents, and in this case clause 9 is the clause which gives rise to these proceedings, and it reads as follows:

"9. I give, devise and bequeath all my real estate and all the rest, residue and remainder of my personal estate of whatsoever nature and kind and wheresoever situate unto my wife Louise Grossi to be hers absolutely."

This appears to me to be a specific devise of all the testator's real estate and the residue of his personal estate to his widow.

Clause 7 of the will reads as follows:

"7. I bequeath a legacy of Four Thousand Dollars (\$4,000.00) to each of my nephews and nieces living at my decease who are the children of my brothers Eugene A. Grossi, Charles S. Grossi, Romeo J. Grossi and Joseph J. Grossi respectively, each of such nephews or nieces to receive his or her legacy, together with accumulated income thereon, upon arriving at the age of twenty-one years, and if any of my said nephews or nieces shall be under the age of twenty-one years at the date of my death, my said Trustee shall retain out of my estate and set aside and invest the amount of said legacies, and pay the legacy of One Thousand Dollars to each such nephews or nieces, together with the accumulated income thereon, as and when each of such nephews or nieces shall attain the age of twenty-one years, but if any of such nephews or nieces shall die before attaining the age of twenty-one years then the legacy to such nephew or niece who shall not live to attain the age of twenty-one years shall lapse and fall into the residue of my estate."

And clause 8 of the will reads as follows:

"8. In addition to the above legacies I give and bequeath to each of my said nephews or nieces, being the children of my said brothers, who before attaining the age of twenty-five years shall pass the Senior Matriculation examination to the University of Toronto, or shall pass the equivalent examination in the English language to any other University of equal standing to the University of Toronto elsewhere in Canada or in the United States of America or in England or elsewhere, the additional sum of One Thousand Dollars (\$1,000.00) as a prize or reward, and I direct that each nephew or niece shall receive his or her prize or reward for passing such Senior Matriculation examination or the equivalent thereof as aforesaid, upon delivery to my said Trustee of official certificate issued by the Registrar or officer in charge of such examinations, even if such nephew or niece shall not at that date have attained the age of twenty-one years, so that such nephew or niece may be assisted by such prize or reward in entering on a University course, but I direct that any of said nephews or nieces who shall not pass such examinations before attaining the age of twenty-five years shall cease to be eligible for such reward or prize. I direct that the receipt of any nephew or niece, even if under the age of twenty-one years, who shall have complied with the above conditions and thereby earned the above proffered prize or reward shall be a sufficient discharge to my said Trustee for such payment. In the meantime, I direct my said Trustee on my decease to set aside in a separate fund a sufficient sum to provide for all prospective prizes or rewards under this paragraph of my will, and the amount of each prospective prize or reward which shall not have been earned or gained by any nephew or niece who shall have attained the age of twenty-five years shall fall into the residue of my estate."

The learned Chief Justice has construed the words, "shall retain out of my estate" and "shall lapse and fall into the residue of my estate" in clause 7, and the direction "to set aside in a separate fund" and "shall fall into the residue of my estate" in clause 8, as qualifying clause 9, and as effecting what is described in *Greville v. Browne* as "blending the whole estate in one mass" and constituting the legacies a charge on the real estate.

I agree with the argument put forward by Mr. McCarthy that the general rule is that unless there is found something in the will constituting legacies a charge on the real estate, the personal estate is primarily liable to the exoneration of the real estate.

In this view of the matter, cases falling within *Greville v. Browne* are in reality an exception to the rule.

I find in this will no words indicating any intention on the part of the testator to constitute his real estate and personal estate one mass. On the contrary I find a clear gift to his widow of all his real estate, and no evidence of an intention to have the gift to his widow cut down in aid of the legacies bequeathed to his nephews and nieces.

I think it will be found upon examination, that in all cases in which the principle of *Greville v. Browne* has been followed, there has been by the terms of the will a blending of the real and personal estate.

For these reasons I think the answer to question 3 in the notice of motion before the learned Chief Justice should be that the legatees referred to in the will are not entitled to be paid their legacies out of the real estate; and the answer to question 4 should be that the wife is entitled to receive all his real estate.

As I understand it there is no appeal as to the remaining questions determined by the learned Chief Justice. I think the widow is entitled to her costs of this appeal out of the estate also the Official Guardian and I would make no further order as to the costs of the appeal.

GILLANDERS J.A. (dissenting):—The facts are fully set forth in the reasons of the learned Chief Justice of the High Court from whose order, in so far as it relates to the construction of the will of the late Arthur J. Grossi, this appeal is taken.

The question for decision is whether or not on a consideration of the deceased's will, clause 9 thereof should be construed:

“(a) As a residuary clause in that all property passing under it should be treated as a residue of the whole estate as a mass after deducting therefrom what is specifically given and bequeathed by prior clauses thereby, making the real estate liable for the payment of any deficiency there may be after the personal estate is exhausted in the payment of legacies, or

“(b) As containing a specific devise of the testator’s real estate to his widow thereby exonerating it from the payment of legacies.”

The question involved is, I think, one of no little difficulty, and after the best consideration I have been able to give the matter, I find myself, with respect, with a view at variance to that held by the majority of the Court, and am of opinion that the order appealed from should be affirmed.

I need not repeat at length the discussion of the cases contained in the reasons of the learned Chief Justice.

The appellants urge that in clause 9 the testator makes it clear that he distinguished in his mind between his realty and his personalty by giving, devising and bequeathing all his real estate to his wife indicating, it is urged, that he had present in his mind the fact that he had not encroached upon his realty but had already dealt with a certain portion of his personalty, and that therefore he did not treat his whole estate as one mass out of which the legacies were to be paid, his wife taking the residue. In support of the contention that the will should be so construed, we are referred to various cases, in particular *Wells v. Row* (1879), 48 L.J. Ch. 476, and *James v. Jones* (1882), 9 L.R. Ir. 489. These cases are discussed in the reasons of the learned Chief Justice. It should be noted that in *Wells v. Row* (*supra*) the exact question there for decision was not the same as in the case at bar. Mr. Justice Fry, after reading the clause of the will there under consideration, states:

“It is not disputed that these words are sufficient to create a charge on the real estate in favour of the legatees, and the question I have to determine is whether the debts and legacies are charged on the real and personal estate *pari passu*.”

It is not contended here that the legacies should be borne by the real and personal estate *pari passu*; it is only urged that the real property devised to the widow must be resorted to for the payment of any deficiency that may exist in the payment of legacies after the personal estate is exhausted.

In giving consideration as to the view that should be applied here, I am much assisted by the words of Kekewich J. in *In re Bawden*, [1894] 1 Ch. 693, particularly at page 698, where he refers to the rule laid down in *Greville v. Browne*, 7 H.L.C. 689:

“That rule is laid down by Lord Campbell in these words— ‘If there is a general gift of legacies, and then the testator

gives the rest and residue of his property, real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass; that part of that mass is represented by legacies, and that what is afterwards given, is given *minus* what has been before given, and therefore given subject to the prior gift.' That, I take it, is a general rule which ought not to be frittered away by verbal distinctions, and Lord *Campbell* does not mean, and his words do not mean, and the decision in *Greville v. Browne* does not mean, that the testator must in language give the 'rest and residue', or even the 'rest' or the 'residue'. What is meant is that if he has in effect given the rest or the residue of his property in such a way that he has blended the whole of it in one mass, that is evidence of an intention that the legacies shall come out of that mass, which is only formed, in its ultimate concrete shape, after the deduction of those legacies."

The testator here by the first eight paragraphs of his will gives and bequeaths certain specific legacies, and in my opinion what light a reading of these paragraphs throws on the question now to be decided, seems to indicate that the testator had in mind taking these legacies out of his whole estate. In paragraph 7 he provides for his trustees retaining certain legacies "out of my estate," and in case any of such legacies lapsed it was to "fall into the residue of my estate." Clause 8 contains a similar provision for legacies under certain conditions to "fall into the residue of my estate."

After making provision in the first eight paragraphs for legacies and gifts to charitable objects and to various nephews and nieces, he proceeds in clause 9—the one under particular consideration—as follows:

"9. I give, devise and bequeath all my real estate and all the rest, residue and remainder of my personal estate of whatsoever nature and kind and wheresoever situate unto my wife Louise Grossi to be hers absolutely." The remaining paragraphs of the deceased's will merely deals with the appointment of trustees of certain trusts to act in his place and stead following his decease.

I think the objective of the testator in paragraph 9 of the will was to leave to his widow all that he had left after the prior provisions in his will. It is done in one paragraph and in one sentence, and read with the prior paragraphs of the

will I can only conclude that the testator had in mind his estate as a whole, as one mass; that the references to his estate in paragraphs 7 and 8 are to his whole estate and not to his personal estate alone, and that *in effect* clause 9 is a complete disposition of the residue of his estate after deduction of the legacies.

Nothing but the construction of the will in respect of the applicability of the rule in *Greville v. Browne* was argued before the Court, and in any event in view of the opinion I have formed, it is unnecessary to discuss it; but there being no charge in the will for the payment of debts out of real estate, and assuming, as the material would indicate, that after payment of debts out of the personal estate, the residue of the personal estate would be inadequate to pay in full the charitable bequests, legacies and prospective prizes, and keeping in mind the provisions of section 5 of The Devolution of Estates Act, R.S.O. 1937, Ch. 163, it might be of interest to consider whether or not the same result might not be reached by a proper marshalling of the assets of the deceased's estate which would involve a consideration as to whether or not clause 9 is a residuary devise or a bequest within the provisions of section 5.

Adopting, as I do, the reasoning for and conclusion of the learned Chief Justice in the judgment appealed from, and for the further reasons stated above, I am of opinion that the appeal should be dismissed with costs of all parties represented on the appeal payable out of the estate.

In any event of the appeal, however, I agree with my brother Henderson that the Official Guardian is entitled to his costs.

Appeal allowed, GILLANDERS J.A. dissenting.

[COURT OF APPEAL.]

Bell Telephone Co. of Canada v. Kan Yan Gan Co. et al.

Motor vehicles—Negligence—Damage to poles and wires of telephone company situate on road allowance but under bridge carrying traffic—Vehicle falling off the bridge—Onus of proof—Res ipsa loquitur—The Highway Traffic Act, R.S.O. 1937, ch. 288, sec. 48.

The plaintiff company brought this action to recover compensation for damage done to its poles and wires as the result of the operation of a motor vehicle owned by the defendant. The poles and wires in question were situate upon a road allowance underneath a bridge constructed to carry traffic across a valley, and the defendant's automobile while travelling along the bridge, fell off the bridge and damaged the plaintiff's poles and wires.

Held, that the damage to the plaintiff's poles and wires was sustained "by reason of a motor vehicle on a highway" within the meaning of The Highway Traffic Act, R.S.O. 1937, ch. 288, sec. 48, and therefore the onus was cast upon the defendant to establish that its driver had not been negligent. On the evidence this onus was held not to have been satisfied and therefore judgment was entered in favour of the plaintiff company for the extent of the damage done.

AN action brought to recover compensation for damage alleged to have been done to certain poles, wires and cables of the plaintiff company.

The action was tried by HOGG J., without a jury, at Toronto. *A. C. Heighington*, K.C., and *D. M. Symons*, for the plaintiff. *J. F. McGarry*, for the defendants.

September 5th, 1940. HOGG J.:—This is an action in which the plaintiff company claims compensation for damage alleged to have been done to its poles, wires and cables by reason of a truck owned by the defendants, and driven by an employee of the defendants, leaving No. 2 highway while travelling in a westerly direction, when it was upon a bridge known as the Rouge Hill bridge across the ravine through which the Rouge River flows, some miles east of the City of Toronto, and falling into the river below after having caused the aforesaid damage. The mishap, in which the driver of the truck was killed, happened about noon on the 6th February, 1939. The truck in question crashed through the railing on the north side of the bridge, fell upon the plaintiff's telephone poles, lines and cables, which are upheld on poles situated in the ravine on the north side of and below the bridge. The plaintiff claims the damage was caused by the negligence of the driver of the truck, and contends that under the terms of sec. 48 of The Highway Traffic Act, R.S.O. 1927, c. 288, the onus of proof that the damage to the plaintiff's property did not arise through the negligence or

improper conduct of the owner or driver of the defendant's truck, is upon the defendants.

According to the evidence produced by the plaintiff company, the poles and cables in question are located upon the road allowance as shown on the registered plans. The evidence is also to the effect that the bridge is situated over this road allowance, and the bridge itself is the only travelled road or highway across the Rouge River and the deep ravine through which the river flows. Section 453 of The Municipal Act, R.S.O. 1937, ch. 266, provides, *inter alia*, that except in so far as they have been stopped up according to law, all allowances for roads made by the Crown surveyors and all highways laid out or established under the authority of any statute, shall be common and public highways. In *Niagara Navigation Co. v. Town of Niagara* (1914), 31 O.L.R. 17, it was said that land marked out on a plan for a road allowance does not lose its character because not used. I am therefore of the opinion that the whole of the road allowance established on the plan is a common public highway, although except for the roadway across the bridge the road allowance is not used and cannot be used for traffic.

See also *R. v. The Great Western Ry. Co.* (1862), 21 U.C.Q.B. 555.

The definition of a highway in The Highway Traffic Act, sec. 1(f) reads:

“ ‘highway’ shall include a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, designed and intended for, or used by, the general public for the passage of vehicles.” As the road allowance is a common and public highway it comes within the definition. The road allowance was originally intended for the purpose of the passage of vehicles, although in so far as modern times are concerned and with respect to the operation of motor vehicles, it could only be so used by the erection of the aforesaid bridge.

The question now arises for determination whether the provisions of The Highway Traffic Act apply to the circumstances of this case, where the property which has suffered damage was not upon the used portion of the highway but was upon part of the road allowance. In *Scott v. Philp* (1922), 52 O.L.R. 513, where damage was caused by a motor car leaving a highway and colliding with the verandah of the plaintiff's house, Meredith C.J.O. was in doubt whether sec. 23 of The Motor Vehicles Act

was applicable. This section cast the onus upon the defendant, as does sec. 48 of the present Highway Traffic Act. There are, however, several more recent decisions in the Ontario Courts and in the Supreme Court of Canada which hold that when the damage complained of is caused by a motor car which is upon the travelled portion of a highway but leaves such part of the highway and collides with or hits a person or property not on that part of the highway used for vehicular traffic, then, in such case, upon the driver or owner of the motor vehicle causing the damage are imposed the terms contained in sec. 48 of The Highway Traffic Act. In *Nugent v. Gunn* (1919), 16 O.W.N. 145, affirmed by the Court of Appeal in 17 O.W.N. 53, Rose J. said that "whether the collision occurred on the roadway or on the sidewalk, the loss or damage of which the plaintiff complained was sustained by reason of a motor vehicle on a highway, and the onus or proof that the loss or damage did not arise through the negligence or improper conduct of the driver of the car was upon the defendants." In *Poole & Thompson Ltd. v. McNally*, [1934] S.C.R. 717, Crocket J., who delivered the judgment of the Court, said, at page 724: "It is manifest from the whole language of this sub-section that the intention of the legislature was to make every owner of a motor vehicle responsible for any loss or damage resulting from its operation on a highway. . . ."

In *Hughes v. Watkins* (1928), 61 O.L.R. 587, in the Court of Appeal, Mulock C.J.O. was of the opinion that it was not necessary that the injured person be on the highway when injured, but it was sufficient if the vehicle was then on the highway, "and when so situated exercised a force which uninterruptedly extended beyond the highway and occasioned injury there." Section 2(f) of The Highway Traffic Act, 1923, defined "highway" in the same language as does the present statute.

Magee J.A., referring to the onus section of the statute then in force, said at page 592, "It is to be noted, however, that 'highway' is not said to mean but only to include the way used for vehicles. I cannot convince myself that sec. 54 refers to less than what it says, that is, to damages occasioned by a motor vehicle—or that it would not apply to collisions or negligence on a farmer's driveway just as much as to the same on a highway."

Hodgins J.A., p. 595, said: "On consideration, I think the definition of 'highway' is wide enough to include the whole

width of the allowance or road, though if it has a more restricted meaning, the case is still within the statute."

Ferguson J.A., at p. 596, used the following language: "I am of the opinion that there is nothing in para. (f) of sec. 2 which limits or indicates an intention to limit the primary meaning of the word 'highway', but rather that para. (f) is intended to and does extend rather than limit the primary meaning of the word 'highway', and consequently that para. (f) affords no satisfactory basis for the suggestion or contention that the word 'highway' as used in the Act means only a portion of the highway, and particularly that portion which is designed and intended for motor traffic. For these reasons I am of opinion that when the plaintiff was on the kerb and sidewalk she was on the 'highway', within the meaning of that word as used in the Act."

The interpretation to be placed upon the present section 48 of the statute to be gathered from the authorities mentioned, is, confining it to its narrowest limits, that where the injury or damage complained of was caused by reason of a motor car on a highway, that is to say, when a motor car being upon a highway either causes damage while still on the travelled portion of the highway, or leaving such travelled portion of the highway causes damage to a person or property situated upon the road allowance but off the travelled part of the highway, the terms of The Highway Traffic Act apply.

From the opinions of some of the Judges in *Hughes v. Watkins* it may be gathered that the Act applies where the actual damage occurred even outside of the boundaries of the road allowance, but it is clear that the above mentioned authorities support the view that the Act applies where the damage occurred within the limits of the road allowance but outside that part of the highway used for motor traffic.

I must therefore hold that as the property of the plaintiff company was situated upon the road allowance as shown by the registered plans, the defendants are subject to the terms and provisions of The Highway Traffic Act.

The roadway across the Rouge River bridge is 24 feet 6 inches in width, and the bridge is 702 feet 6 inches in length. Along the north side of the roadway across this bridge is a sidewalk 6 feet in width, which is 6 inches above the roadway. Although on the day of the accident, the surface of the road

on the bridge was clear and dry, the right-angle formed by the sidewalk upon the bridge with the roadway, was filled with ice. The highway, including that portion of the same upon the bridge, slopes downward towards the west from a point 620 feet east of the easterly end of the bridge, and a short distance west of the bridge the road again rises towards the west. A clear view may be had from the brow of the slope east of the bridge, across the whole length of the bridge and for some distance beyond the bridge towards the west.

The Provincial constable who examined the scene of the accident shortly after it had occurred, observed, what he termed, a "brush mark," made by a wheel or wheels of a vehicle, this mark being visible along the edge of the sidewalk in the angle where the edge of the sidewalk meets the roadway, from the point where the truck left the bridge for 50 feet towards the east. This witness said that this mark, in his opinion, showed that the truck "was going to mount on to the sidewalk."

The roadway across the bridge is of sufficient width to allow two vehicles to pass, but there are signs adjacent to the roadway at both ends of this bridge warning drivers of vehicles not to pass other vehicles on the bridge.

Mr. Thomas Whillier, called by the defence, was the only eye-witness of the accident. He happened to be driving towards the east on No. 2 highway on the morning of this unfortunate accident, and was near a sand pile situate on the north side of the highway and some 800 feet distant from the westerly end of the bridge when he observed the circumstances immediately before and at the time of the mishap.

Mr. Whillier cannot be said to be what is termed a good witness, in all respects. He was somewhat vague as to just where the defendant's truck was when he first saw it; but I think he was attempting to tell honestly and truthfully what he observed at the time in question.

He said that when he was near the sand pile already mentioned, he could see along the whole length of the bridge and to the brow of the hill east of the bridge. In view of the fact that there is evidence that from a position on the highway opposite to the sand pile in question his view would be obstructed, owing to a slight curve in the roadway and to certain trees, it may be doubtful whether such a view as Mr. Whillier says he had, could be obtained from that point; and it is probable that Mr.

Whillier, as his evidence was that he could see to the brow of the hill to the east, was somewhat east of the sand pile at this time. This witness stated that at the time of the accident he was under the impression that the brow of the hill to the east was the point at which the bridge ended.

When Whillier was near the sand pile, he saw two cars proceeding in an easterly direction upon the bridge, one of which, upon reaching the middle of the bridge, turned to the north in an attempt to pass the car ahead of it. The witness is not clear or definite as to just where the defendant's truck was at this time. He said he first saw the defendant's truck on the brow of the hill to the east, which would place it at a distance of about 600 feet from the bridge, and again that it was further down this slope, and again that the truck seemed to be only 100 feet away from the two cars when one of them was attempting to pass the other on the bridge. He said that the truck had not room to avoid the on-coming car attempting to pass the one in front of it; that it swerved to the north and then crashed through the railing of the bridge. His evidence was that the truck left the bridge when the two on-coming cars were abreast of each other, and that the most westerly car which was attempting to pass the one in front of it was endeavouring to get back on to its proper side of the bridge or in line again.

Considering the evidence of this witness as a whole, I think that it is to the effect that the defendant's truck, in order to avoid a collision with the on-coming cars, was directed or driven over to the north side of the roadway as far as the curb formed by the sidewalk and the roadway, and that this curb, being full of ice, caused the wheels of the truck to mount onto the sidewalk and thence through the railing of the bridge.

Whillier said that the speed of the truck was not excessive, and there is evidence that it was in good mechanical condition.

The onus which section 48 of the statute places upon the defendants is not displaced by some evidence that the defendants were not negligent; but the question is whether or not the defendants have sufficiently shown that they were not negligent, and if, on the whole evidence, the defendants establish this to the satisfaction of the jury, or of a Judge trying the case without a jury, the defendants are entitled to judgment. But if the issue is left in doubt, or the evidence is evenly balanced, the defendant, because of the statutory onus, will be liable: *Newell*

v. *Acme Dairy Company, Limited*, [1939] O.R. 36, per Gillanders J.A. at p. 45, referring to *Winnipeg Electric Company v. Geel*, [1932] A.C. 690.

I think the evidence shows that the cause of the mishap was the attempt of one of the on-coming cars from the west endeavouring to pass the one in front of it while they were both upon the bridge; and I think, giving careful consideration to the whole of Whillier's evidence, that this attempt to pass was made when the defendants' truck had approached so close that its driver in attempting to avoid a collision was compelled to go as close as possible to the edge of the sidewalk and that the wheels of his truck mounted onto the sidewalk because of the ice along the curb. This circumstance I think is demonstrated by the fact that the brush mark or wheel mark along the edge of this curb or sidewalk commences fifty feet east of where the truck left the bridge.

It was argued on behalf of the plaintiff company that the driver of the defendants' truck had sufficient time to stop his truck and so could have avoided the impending collision; but although it is true Whillier is somewhat vague and not clear as to the distance the truck was away from the oncoming cars when one attempted to pass the other, I conclude upon the evidence of this witness, taken as a whole, that the truck went on to the bridge when the two cars were abreast about the middle of the bridge. Taking this as a fact, the attempt to pass was made when the truck could only have been a comparatively short distance away.

The ice along the curb in my view contributed materially to the accident. It appears to me that this ice was an important factor in causing the wheels of the truck to mount from the roadway to the sidewalk.

I think it reasonable to conclude upon the evidence, that this mishap was caused, not by negligence on the part of the driver of the defendants' truck but by the situation which confronted him and the presence of ice in the angle formed by the sidewalk and the floor of the bridge.

The evidence, in my opinion, is sufficient to satisfy a jury that the defendants' driver was not negligent.

It was argued on behalf of the plaintiff that the principle *res ipsa loquitur* must be applied to the circumstances presented

by this case. There is no question but that this doctrine may be applied, if the facts warrant it, to accidents which occur on a highway in which motor cars are involved: *Kough v. Adkins*, [1933] O.W.N. 709.

In the absence of evidence as to how the truck in question ran through the railing on the north side of the bridge, the doctrine would be sufficient I think, apart from the statute, to fix the defendants with responsibility.

In *United Motor Service Inc. v. Hutson*, [1937] S.C.R. 294, Duff C.J. states the doctrine of *res ipsa loquitur* to be as set out in *Scott v. London and St. Katherine Dock Co.* (1865), 3 H. & C. 596, at 601. There it was said:

"There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

The learned Chief Justice, after referring to the above-stated definition of the principle, said, at p. 297:

"Broadly speaking, in such cases, where the defendant produces an explanation equally consistent with negligence and with no negligence, the burden of establishing negligence still remains with the plaintiff."

In so far as the doctrine of *res ipsa loquitur* is concerned with reference to the present case, my conclusion is, in view of the explanation given on behalf of the defendants, that the burden of proving negligence would remain, apart from the statute, upon the plaintiff. See also *Broom v. Creed et al.*, [1937] O.W.N. 475.

I do not think that the facts presented in this action bring the case within the principle laid down in *Groves v. County of Wentworth*, [1939] O.R. 138.

The action must, in my opinion, be dismissed with costs.

The plaintiff appealed to the Court of Appeal from the judgment of Hogg J.

November 13th, 1940. The appeal was heard by RIDDELL, MIDDLETON and MASTEN JJ.A.

A. C. Heighington, K.C., and D. M. Symons, for the plaintiff, appellant, contended, as follows:

1. That the driver of the truck was negligent.

2. That under sec. 48 of the Highway Traffic Act, R.S.O. 1937, ch. 288, the onus of proof was on the defendant company to establish that damage to the plaintiff's property did not arise through the negligence of the defendant company. The telephone poles were off the highway, but upon the road allowance, and therefore sec. 48 applies.

3. *Res ipsa loquitur* doctrine applies to highway cases, and therefore, the onus of proof was on the defendant to disprove negligence.

The driver of the defendant company's truck had an unobstructed view for a quarter-mile. There was a sign "No Passing on Bridge" erected at the end of the bridge, which the driver passed as he came onto the bridge. He saw two cars approaching, one passing the other, and did not apply his brakes.

The onus under sec. 48 of the Highway Traffic Act is not displaced by some evidence that defendant was not negligent; if the evidence is evenly balanced, the defendant will be liable because of the statutory onus: *Newell v. Acme Farmers Dairy Co. Ltd.*, [1939] O.R. 36, Gillanders J.A. at p. 45; *Winnipeg Electric Company v. Geel*, [1932] A.C. 690; *Katz v. Taylor*, [1939] O.W.N. 482.

The evidence of the witness Whillier, who told three different stories, could not be sufficient to discharge the onus under sec. 48, nor displace the onus under the *res ipsa loquitur* rule.

The doctrine *res ipsa loquitur* applies to the facts of this case. There was positive evidence of negligence on the part of the driver of the defendant's truck, in rushing onto the bridge when he must have seen two cars, one passing the other, coming in his direction.

J. F. McGarry, for the defendants, respondents, contended that the trial Judge heard the witness Whillier and accepted his evidence that two vehicles were going east and passing when the truck entered the east end of bridge—350 feet away. Having accepted the evidence of 350 feet, whatever the truck-driver did should be gauged by the ordinary standard of negligence—the driver did something by getting the truck up on the sidewalk in order to avoid a collision.

The accident was caused by the negligence of an unknown driver. The driver of the defendant company's truck, in state of emergency and in the situation with which he was confronted, should not be held at fault, even though he may not have taken the best course possible: *Harding v. Edwards*, 64 O.L.R. 98; *Smith v. Cowan* (1926), 31 O.W.N. 110. The evidence is sufficient to discharge the onus on the defendant, if such onus was on the defendant. The *res ipsa loquitur* rule does not apply, as adequate explanation for the accident was given in the evidence: *United Motor Service Inc. v. Hutson*, [1937] S.C.R. 294.

Cur. adv. vult.

November 18th, 1940. RIDDELL J.A.:—A servant of the defendants was driving a car west on a public highway when, coming upon a bridge, he encountered two other cars, one trying to pass the other, going east on the bridge. The car of the defendant, apparently turning to the right to avoid the others went over the side of the bridge and, falling, seriously injured the wires of the plaintiff. The plaintiff brings this action for damages, charging negligence on the part of the defendants. The action, tried by Mr. Justice Hogg, resulted in the learned Judge finding that the defendants had met the statutory onus and dismissed the action—the plaintiff now appeals.

I do not think it necessary to consider if the damage was done on a highway.

While for a time at least it was considered that the statutory onus (R.S.O. 1937, ch. 288, sec. 48) was only to be appealed to if and when the damage was caused on the highway, it is now perfectly settled—it would be mere waste of time to cite authorities—that the onus is cast upon the driver of a car which, on the highway, leaves it and does damage. This is not disputed, and is considered law by the learned trial Judge.

While at the hearing, I was somewhat inclined to think that we should not interfere with the finding of the learned trial Judge, a careful perusal of the proceedings has convinced me that he was in error.

The evidence is most unsatisfactory, but this much appears clear: the servant of the defendants had a clear view of the bridge for several hundred feet; he must have seen the two cars approaching him from the west on the bridge, and must, were he taking care, have seen the one trying to pass the other in ample

time to avoid difficulty. It may also be said that there was a notice posted up at the end of the bridge forbidding cars passing on the bridge—but I do not stress that fact. The fact, then, as I see it, is that the servant of the defendants having—or being in such a position that with ordinary prudence he would have had—ample notice of a probable evil result if he did not stop, went on and took his chances—negligently, as I think. This was the cause of the injury to the plaintiff's property, and I think that the defendants are liable therefor in law.

The appeal should be allowed and judgment entered for the plaintiff with costs here and below.

I had thought that the best course was to direct that if the parties cannot agree as to the amount of damages, there should be a reference to the Master to determine the amount, the costs of the reference to be in the discretion of the Master. But my brethren being satisfied with the evidence as to amount, I do not dissent.

MIDDLETON J.A.:—This action arises from the operation of an automobile upon a highway by the defendant company. A servant of the defendant was driving westerly upon the highway at the time of the accident. He met two automobiles which were passing upon the Rouge bridge. One car was on the wrong side of the road, leaving little of it for the defendant's car. This car avoided a collision with the other vehicles but ran off the roadway and the bridge to the north destroying four panels of the fence to the north and, plunging downwards, injured the Bell Telephone Company's cable on the main line between Toronto and Montreal.

The bridge is a structure over a rather deep ravine through which the Rouge River flows. Some doubt was expressed at the trial, and in the judgment of the learned trial Judge, as to whether this bridge of a height of some 65 feet from the Rouge River and about 50 feet at the place where the automobile left the bridge, was to be regarded as the "highway", and whether the highway or the land below the bridge, upon which the telephone line consisting of poles and carrying a cable, was to be regarded as the highway.

It appears to me to be plain that both the travelled road carried above ground on the surface of the bridge was the highway, and the road allowance underneath the bridge was also

highway for all purposes for which it was used, including the construction of the plaintiff's telephone line.

The language of the statute (R.S.O. 1937, ch. 288, sec. 48) is not to be frittered away unnecessarily by meaningless distinctions.

The bridge is a structure some 700 feet in length, and it was visible from the east for some 800 feet beyond the bridge. If the man operating the defendant's car had been attending to his driving he could have seen the cars upon the bridge and observed that one of them at least was not obeying the sign erected at the entrance to the bridge and was disregarding the white line painted in the middle of the road and not leaving adequate room for the defendant's car to cross safely. The fence of the bridge was 4 feet high and of a light steel construction, quite inadequate to withstand the assault of a rapidly moving car. The roadway was 25 feet 6 inches wide, so that it would be fully occupied by three cars attempting to pass.

Apart from the statutory onus placed upon the defendants, there is little evidence of the happening of the accident, and that little is most unsatisfactory. The driver of the defendants' truck lost his life as a result of this accident. The learned trial Judge found that the defendants had, notwithstanding this, satisfied the onus placed upon them by the statute. With this we find ourselves unable to agree. The accident was at midday, and there was apparently little traffic upon the highway. The least delay on the defendant's part would have avoided what turned out to be a most unfortunate accident. There was nothing explaining why the defendant did not see the approaching car in time to avoid the accident. The driver of this car, who really appears to have been the main cause of the accident, is not before the Court. Apparently his identity is not known, so the defendants are left to bear the consequences of this unfortunate occurrence.

There must be judgment for the plaintiff with costs here and below. Some challenge is made as to the amount of damages sustained, but, having investigated this with much care, I find nothing by which it can be reduced.

MASTEN J.A.:—I agree in the reasons both of my brother Riddell and of my brother Middleton. I would direct judgment to be entered as provided by the judgment of Middleton J.A. rather than to direct a reference.

Appeal allowed with costs.

[COURT OF APPEAL.]

North American Life Assurance Co. v. Johnson.

Linton v. Johnson.

Mortgages—Assumption of mortgage by purchaser of equity of redemption—Absence of covenant by the grantee in the deed to assume the mortgage—Reference to agreement—Assignment to mortgagee by vendor of equity of right of indemnification—Whether mortgagee entitled to personal judgment against purchaser of the equity—Limitation of actions—Payments on account—Sec. 17a of The Mortgages Act, R.S.O. 1937, ch. 155, as amended by 1939, ch. 28, sec. 1.

It is a recognized general principle that when a written agreement is carried into effect by a deed, the deed becomes the final evidence of the rights of the parties and is not liable to be varied by reference to the agreement. But it is an equally well recognized principle that for the purpose of construing the deed one may look at evidence to explain what is meant in the deed by expressions not entirely clear or self-explanatory. Thus where, in a conveyance of land, the consideration was expressed to be "other valuable consideration and the sum of \$1.00", evidence was held to be admissible to ascertain what was meant by the expression "other valuable consideration", and the negotiations between the parties and the preliminary agreement having been examined, it then became apparent that the other consideration referred to in the deed meant the assumption and payment of mortgages upon the property.

As a general rule, in order to stop the Statute of Limitations running against a creditor, any payments on account made by the debtor must be made to the creditor or his agent. But this is subject to the exception that payments by the debtor made by arrangement for the benefit of the creditor are for this purpose to be regarded as payments to the creditor. Hence, where a purchaser of the equity of redemption, who had agreed with his vendor to assume and pay an outstanding mortgage, made payments on the mortgage to the mortgagee, such payments were held to have been made by the purchaser on account of his obligation to his vendor and for the benefit of his vendor, and these payments operated to stop the Statute of Limitations running against the vendor with respect to the vendor's right of action against the purchaser of the equity upon the purchaser's obligation to assume and pay the mortgage.

Quaere, by the Court of Appeal, whether sec. 17a of The Mortgages Act, R.S.O. 1937, ch. 155, as added by 1939, 3 Geo. VI, ch. 28, sec. 1, applies where the transfer of the equity of redemption took place before sec. 17a came into force.

AN action by The North American Life Assurance Company on a mortgage for foreclosure and personal judgment against the defendant Johnson, and an action by L. J. Linton on a mortgage for personal judgment against the defendant Johnson.

The actions were tried together by ROSE C.J.H.C., without a jury, at Toronto.

R. S. Joy, for the North American Life Assurance Company, plaintiff.

S. Rogers, K.C., for L. J. Linton, plaintiff.

C. B. Henderson, K.C., for the defendant Johnson.

May 15th, 1940. ROSE C.J.H.C. (delivered orally at the conclusion of the trial):—In 1931 Mr. J. H. McGillivray held the registered title to the lands that are in question in these actions. He was not the sole owner, he held for himself and one Guild in association with whom he was erecting the buildings which are now on the lands, but that is immaterial; he had the registered title and he dealt with the lands as owner. By a first mortgage dated May 9, 1931, Exhibit 2, he mortgaged the lands to the plaintiffs the North American Life Assurance Company to secure repayment of \$14,000.00 with interest, part of the principal money to be paid in half-yearly instalments, the last of them on the 1st November, 1935, and the balance of the principal to be due and payable on the 1st May, 1936.

By a second mortgage dated August 21, 1931, Exhibit 8, he mortgaged the lands to one Posnik to secure payment of \$7,000.00 and interest. That mortgage is now held by the plaintiff Linton under an assignment from Posnik dated March 31, 1932, which assignment was for valuable consideration.

By a deed dated August 31, 1931, McGillivray conveyed his equity to the defendant Johnson, Exhibit 6. This conveyance was made pursuant to an agreement for exchange dated August 14, 1931, which provided for the conveyance of McGillivray's equity, or as it is expressed, the land subject to the two mortgages, in exchange for Johnson's equities in certain houses named in the agreement, or, as it is expressed, for the houses subject to specified mortgages. The agreement, which is not under seal, expresses what is called a covenant on the part of each of the parties to assume the encumbrances on the property conveyed to him by the other. The transfer of McGillivray's interest to Johnson or to some other person had been in contemplation at the time of the making of the mortgage to the Assurance Company dated May 9, 1931; indeed, the Assurance Company appears to have been unwilling to make the advance, unless the land was to be owned by someone of greater financial ability than McGillivray.

Apart from the agreement of exchange, it is quite apparent upon the evidence that, when Johnson agreed to the exchange, it was in contemplation by him and by McGillivray that, the exchange being effected, Johnson should be responsible for the two mortgages that are in question and that McGillivray should be responsible for the mortgages standing against the properties

that were to be conveyed by Johnson to McGillivray. This appears not only from Johnson's evidence given upon examination for discovery, but also from the statement of adjustments prepared when the transaction was being closed; or rather, from the statement of adjustments it appears that the assumption by Johnson of the two mortgages was part of the consideration for the conveyance to him of McGillivray's equity. Johnson in his statements of defence in the two actions has denied that he covenanted to assume the mortgages and has alleged that the clause in the agreement of exchange whereby each party covenanted to assume the existing encumbrances was at his demand struck out of the agreement, although by oversight it was not struck out of the copy that remained in the possession of McGillivray, and he has claimed rectification of the agreement. However, he has adduced no evidence in support either of his denial that he covenanted to assume the mortgages or in support of his allegation of mistake or oversight, and the only thing that there is in the case that points to the possibility of an oversight is the statement by counsel that in a copy or duplicate of the agreement now in the possession of Johnson's solicitor or counsel the clause does not appear. The finding then, I think, is inevitable that the assumption of the two mortgages by Johnson was intended to be and was part of the consideration for the conveyance by McGillivray to Johnson. And the subsequent history confirms the impression created by direct evidence as to what was in contemplation. Johnson made two small payments on account of principal to the North American Life Assurance Company, the first of \$100.00 on December 5, 1931, and the second of \$46.76 on September 14, 1932, and steadily since that time has made payments on account of interest on the whole of the balance of principal money. This appears from the copy of the mortgage account as kept by the Assurance Company, Exhibit 3, which is admitted to be correct, and from a number of the receipts in the possession of Johnson, Exhibit 22, in which the payments made by Johnson, except some for taxes, are shown to be payments of interest. Johnson also made payments to the holder of the second, the Posnik, mortgage. The account set out in the statement of claim in the Linton action is admitted to be correct. It shows nothing paid on account of principal but periodical charges of interest and, until 1936, pretty regular payments.

In the Assurance Company's case what is claimed is foreclosure and a personal judgment against Johnson. In the Linton case what is claimed is a personal judgment against Johnson. There is no denial of the right of the insurance company to foreclosure: the controversy in each case is as to Johnson's personal liability.

The Assurance Company founds its claim to a right to judgment against Johnson for payment both upon an assignment dated November 20, 1939, from McGillivray of Johnson's covenants express or implied and of all McGillivray's rights of action against Johnson arising therefrom, Exhibit 7, and also upon the amendment to The Mortgages Act, R.S.O. 1937, ch. 155, contained in sec. 1 of ch. 28 of the Statutes of Ontario, 3 Geo. VI, 1939, by which was added to sec. 17 of the principal Act a section, 17a (1), which says,

"Notwithstanding any stipulation to the contrary in a mortgage, where a mortgagor has conveyed and transferred the equity of redemption to a grantee under such circumstances that the grantee is by express covenant or otherwise obligated to indemnify the mortgagor with respect to the mortgage, the mortgagee shall have the right to recover from the grantee the amount of the mortgage debt in respect to which the grantee is obligated to indemnify the mortgagor."

Then there is a proviso which does not affect the present case.

In the Linton case the claim is founded upon the same statute and upon an assignment from McGillivray dated November 20, 1939, Exhibit 9. The terms of this last assignment were much debated during the argument. They are said to be the same as those of the assignment which was in the case of *Esser v. Pritzker*, to which I shall have to refer, held or assumed to be sufficient. If the assignment were being drawn now, in the light of the discussion that we have had, I take it that it might be given a form somewhat different from its present form, but, upon consideration of it as it stands, I think that it is sufficient for the purposes of the present case. By it McGillivray assigns to Linton all McGillivray's right, title, and interest in the agreement of exchange, insofar as the same refers to the assumption by Johnson of the second mortgage, together with the right to sue for and recover any moneys owing under the mortgage, and the full benefit of any right of indemnity which McGillivray may

have against Johnson by reason of the assumption by Johnson, under the terms of the said agreement, of the mortgage in the assignment referred to. The doubt about the sufficiency of these words is this: McGillivray's right, or the right of any mortgagor, to compel an assignee of the equity of redemption to pay the mortgage debt may depend upon express or implied contract or may be an obligation arising out of the fact that the equity of redemption has been transferred; but it is stoutly contended that, for certain reasons to which I shall have to refer, McGillivray, after the conveyance, had no enforceable right under the agreement for exchange, and that the assignment was merely an assignment of such rights as McGillivray had under that agreement, and so passed no enforceable right to Linton.

Upon consideration I do not think that that contention can prevail. McGillivray had a right, as I think, arising out of the fact that Johnson became the owner of the equity and that the assumption of the mortgage was part of the consideration for the transfer of the equity; and although the equity was transferred pursuant to the agreement, still, because the assumption of the mortgage was part of the consideration, Johnson, by accepting the conveyance, became bound to McGillivray to pay the mortgage and McGillivray, I think, acquired a right against Johnson which could be assigned to Linton. I do not think that the words of the assignment are limited only to the right to enforce the so-called covenant in the agreement of exchange. I think on the other hand that they are wide enough to cover and do cover all of the rights which McGillivray acquired against Johnson arising out of the assumption by Johnson of the mortgage—not merely the assumption by the agreement, but also the assumption pursuant to the terms of the agreement. That is to say, pursuant to the terms of the agreement Johnson accepted title; by acceptance of title he became bound, as I think, to McGillivray to pay the mortgage; and it is reasonable enough to call that incurring of an obligation to pay the mortgage an “assumption” of the mortgage. As I have said, the words might be better, but I think they are sufficient. Whether they are or are not sufficient is in my opinion a matter of no very great importance, because—and this applies to both cases—I think that the amendment to the Mortgages Act gives to each of the plaintiffs the right to enforce whatever right McGillivray had at the

time of the commencement of this action to compel Johnson to pay the mortgage debt.

It is contended that the amendment, which came into force in April 27, 1939, before the commencement of these actions, ought not to be construed as having what is called a retroactive effect, and ought not to be held applicable in the present cases. I think that is a mistake. Some statutes are, some are not, retroactive, but I do not think that there is here any question of retroactivity at all. The meaning of that expression is discussed in the Court of Appeal in England in *West v. Gwynne*, [1911] 2 Ch. 1, and I do not pause to read what is said about it; because here the statute gives merely a right to a mortgagee to enforce a right which at the relevant time is possessed by the mortgagor—in other words, practically speaking, it relieves the mortgagee of the necessity of procuring an assignment from the mortgagor before proceeding to enforce the mortgagor's right. The words of the statute are, that where a mortgagor has conveyed the equity to a grantee under such circumstances that the grantee is obligated to indemnify the mortgagor the mortgagee shall have the right to recover from the grantee. These words, given their literal and ordinary meaning, apply to the case. Before the commencement of these actions, McGillivray had conveyed the equity to Johnson in circumstances which, in my opinion, obligated Johnson to indemnify McGillivray, and so, according to the words of the Act, the mortgagees at the time of the commencement of the actions had the right to recover from Johnson. The Act does not say, as I have no doubt it would have said had the intention of the legislature been what the defendant contends, that when a mortgagor after April 27, 1939, conveys his equity of redemption certain consequences shall follow. The words are that where a mortgagor has conveyed, as McGillivray had done, the mortgagee shall have a certain right; and I think those words—and this is repetition—apply clearly in the present case and that there is here no question at all of giving a retroactive effect to them. True they relate in a sense to the consequences of something that was done before the Act came into force; but the essential thing is that at the time when the words are to be applied the grantee is under obligation to the mortgagor; and at the time when these words are being applied in the present case Johnson, as I have said, was—by reason of what had been done in the past, it is true, but nevertheless was—under obligation to McGillivray; and so I think the Act applies.

In the Linton case the decision that the Act applies is of importance for the reason that I have stated. I think that the assignment from McGillivray to Linton is sufficient, but if I am wrong as to that, Linton has this other string to his bow, he can rely upon the Mortgages Act if I am construing The Mortgages Act correctly.

In both of the cases, the question whether the amendment to The Mortgages Act is applicable may be of some importance as bearing upon the limitation of the action which is set up. This is more important in the North American Life Assurance Company's case than in the Linton case.

McGillivray's right of action against Johnson has been held to be a simple contract right, to which the six-year limitation applies. In the North American Life Assurance Company's case, five instalments of the principal money, each of \$300.00, became due more than six years before the commencement of the action. Two small payments of principal had, as I have said, been made, but if only instalments of principal and interest falling due within the six years can be recovered, the Assurance Company's claim is \$1,352.24 less than it would be if the six-year limitation is not applicable. In the Linton case there are four such instalments, each of \$50.00, so that the amount, if any, the recovery of which is barred by the statute is \$200.00; and if the six-year period enters into the case, the claim as set out in the statement of claim would have to be reduced by \$200.00 plus interest on \$200.00 during the period of six years preceding the issue of the writ.

Johnson, as I have said, has been making payments of interest. Those payments, if they had been made to McGillivray, would no doubt have sufficed to keep alive McGillivray's right of action for the principal: there would have been implied from them a renewed promise by Johnson to McGillivray to pay the principal money. It is contended that the payments, although made not to McGillivray but to the Assurance Company, have the same effect. It is said that Johnson was under obligation to McGillivray to pay the Assurance Company and that the payments that he made to the Assurance Company ought as between him and McGillivray to be deemed to be payments made pursuant to that obligation. But, while the matter is not free from doubt, I think that when it is remembered that Johnson had two reasons for paying the Assurance Company, one of them his obligation

to McGillivray and the other, and the more important from his point of view, the necessity of making payment if he was to preserve his equity from foreclosure, it is perhaps impossible to attribute his payments to the intention of performing his obligation towards McGillivray. The question is a narrow one. I had to consider it in a somewhat different aspect in *Lewington et al. v. Raycroft*, [1935] O.R. 440, at page 443, and I am not very sure about it, but I think that, if the plaintiffs are compelled to rely upon their assignments, their recovery can be only for the lesser amounts that have been mentioned.

Before going on to discuss the question whether, suing under the amendment to the Mortgages Act, they are restricted to the six years, I ought to mention the fact that the defendant contends that before the commencement of this action McGillivray had lost, not only the right to compel payment of all moneys that fell due more than six years before the commencement of the action, but also all right to enforce Johnson's obligation to pay the mortgage moneys. That contention is based upon the assumption that as soon as there was any default in payment of principal McGillivray's right to compel Johnson to pay the whole of the principal became enforceable. I think the contention is disposed of by the terms of the mortgages themselves. They are in similar form and they provide that, on default of payment of interest, the principal shall become payable at the option of the mortgagee and that, upon default of payment of instalments of principal promptly as the same mature, the balance of the principal and interest shall immediately become due and payable at the option of the mortgagee. If the question were whether the mortgagees' time for enforcing payment of the whole principal had been running for more than six years before the commencement of the actions, the argument might have been formidable; because the mortgagees, if they had chosen to do so, could more than six years before the commencement of the actions have maintained an action for the whole of the principal moneys. But what we are concerned with, both when considering the assignments from McGillivray to the plaintiff and the effect of the Mortgages Act, is the question whether at the time of the commencement of the action McGillivray had lost his right to compel by action Johnson to pay the mortgage moneys—I do not mean whether McGillivray's right to have Johnson pay had been extinguished, but whether McGillivray had lost his right

of action to compel Johnson to pay. I think he had not. McGillivray had no right to exercise the mortgagees' option to call in the whole principal upon default in payment of interest or of an instalment, and no right to force the mortgagees to exercise their option. As each instalment fell due and was unpaid, McGillivray had a right of action in respect of that instalment, and, if an instalment fell due more than six years before the commencement of the present action, I think at the time of the commencement of the action McGillivray had no right of action in respect of that instalment, but I cannot see how he had lost his right of action in respect of the balance of the principal money or in respect of any instalment of interest that fell due within six years of the commencement of the action, or of the time of his assignment to the plaintiffs, which is much the same thing.

Well then, to go on to the question as to whether the plaintiffs, pursuant to the amendment to the Mortgages Act, can recover any larger sum than McGillivray could have recovered: that question depends upon the effect of an amendment to The Limitations Act, ch. 25, sec. 1(2), of the Statutes of Ontario, 3 Geo. VI, 1939, which came into force on the same day as the amended Mortgages Act. The Limitations Act was amended by adding to sec. 48(1) a clause (kk), so that the relevant portion of the statute now reads:

"The following actions shall be commenced within and not after the times respectively hereinafter mentioned,—

"(kk) an action by a mortgagee against a grantee of the equity of redemption under section 17a of The Mortgagees Act, within ten years after the cause of action arose."

The new subsection might have been expressed more clearly, and I have had considerable difficulty in coming to a conclusion as to its effect, if any, in this particular case, but finally, and departing from an opinion which I held at first and to which perhaps I gave expression during the course of the argument, I think that the effect is that in these actions under sec. 17a of the Mortgages Act the plaintiffs are not met with the six-year limitation.

Again as to this, there is the question of retroactive or prospective effect which was raised with reference to the amendment to the Mortgages Act itself, and, again, I think that the cases in which it is said that certain statutes are not to have any retro-

active effect are inapplicable. The six-year provision does not destroy the right, it simply prevents the maintaining of an action for the enforcement of that right; and to take away at any particular time the bar to the maintaining of an action does not appear to me to be doing anything that is retroactive; and so I think that there is nothing retroactive, as the word is used in the cases, in saying for the first time in 1939 that an action to enforce in 1939 a right which had existed for a long time shall not be brought, save within ten years, or any other number of years, after the cause of action arose, even if before 1939 the position had been that such an action should not be commenced after six years from the time when the cause of action arose. However, that is not the only difficulty in construing the section. Whose cause of action or what cause of action is referred to in clause (kk)? Remembering that what the amendment to the Mortgages Act does is to give the mortgagee the right to enforce the mortgagor's right, I think that the new clause in the Limitations Act was intended to say that when the mortgagee, pursuant to the power given by the amendment to the Mortgages Act, sues to enforce the mortgagor's right, he must do so within ten years after the cause of action accrued to the mortgagor, and that I think is the real construction of the amendment to the Limitations Act. It is true that it leads to a certain anomaly: Under sec. 48(1) (g) the mortgagor is limited to six years after the cause of action arose. On my reading of sec. 48(1) (kk) the mortgagee enforcing the mortgagor's right is limited to ten years. That is to say, the mortgagee has four years more than the mortgagor would have for the enforcement of the right. But the fact that there is that anomaly does not seem to me to be sufficient to deprive the added words (kk) of what appears to be their natural meaning. Moreover, it is to be remembered that under the law as it stood before April 27, 1939, the mortgagee had ten years within which to sue upon a covenant contained in any mortgage made after the 1st July, 1894, and that with some modification the same limitation upon the mortgagee's right is continued by clause (k) of sec. 48(1) of the Limitations Act as changed by sec. 1(1) of the amendment of 1939. In other words, the mortgagee's right to sue, whether upon the covenant in the mortgage or for the enforcement of the right of the mortgagor against the assignee of the equity, is made to be as nearly as possible the same—that is to say, ten years—

although there has been no amendment to the statute which fixes six years as the mortgagor's time for enforcing the last mentioned right. So, as I say, I think the mortgagees in these present actions, suing to compel payment by Johnson, are not met by any Statute of Limitations.

Well, that brings me by way of a long preamble to the question which perhaps was most debated during the course of the argument, and that is the question whether, apart from the Statute of Limitations altogether, McGillivray had any right of action against Johnson. The contention by Mr. Henderson was in effect that the right, if any, must be based either upon the agreement of exchange, to the admission of which in evidence he took objection, or upon certain other dealings preceding the execution and delivery of the deed of assignment of the equity, and that none of these—neither the agreement of exchange nor anything else—can be looked at to modify or add to the deed of conveyance itself. The deed professes to convey the lands. In it the grantor covenants that he has the right to convey notwithstanding any act of his and that he has done no act to encumber the lands. Nothing is said about the mortgages, and the deed is not executed by the grantee, Johnson; and the argument, founded to some extent, perhaps to a large extent, upon something said by Mr. Justice Orde in *Esser v. Pritzker* to which I shall have to refer, is in effect the argument adopted by the late Chief Justice of the Common Pleas in *Disney v. Howich* (1925), 56 O.L.R. 606.

In the course of his judgment in the *Disney* case, which was the trial of a third party issue in which the mortgagor sought indemnity from the purchaser of the equity of redemption, the Chief Justice, after saying that it could not be denied that in ordinary circumstances such an obligation existed, though some of the reasons for it did not seem to him to be anything like as convincing as they have sometimes been said to be, went on to say that, giving the fullest effect according to the cases to the obligation, he could not consider it applicable in *Disney v. Howich* for reasons which he stated in these words:

“The transaction in question was carried into full and final effect by deeds of the land and a mortgage executed and registered; and, according to the old rule, which has been applied in full vigour in recent cases, the parties must rely upon their deeds for any relief they may seek;

“And the deed from the plaintiff to the defendant, not only does not give any aid to the plaintiff’s claim, but it contains covenants on his part, in the statutory form, that, notwithstanding any act of his, he had the right to convey, and that he had done no act to encumber the land, etc.; and the mortgages are not in any manner mentioned, or referred to, in it.

“Without a reformation of that deed the plaintiff cannot succeed; by his deed he has excluded the equitable obligation.”

And a little later:

“ . . . if the defendant be liable to him, . . . ” [that is the plaintiff] “ . . . it can be only because he made himself liable, in respect of the mortgages, to his vendor; it is by his act alone that any liability is carried to the defendant—if there be any—to pay these encumbrances.

“And, that being so, the question arises: whether the deed should be reformed so that the plaintiff may have the relief he seeks.”

Then he went on to deal with the question whether there should or should not be a reformation of the deed,—and coming to the conclusion that there should not, he dismissed the action.

That case was taken to appeal and the judgment of the Second Divisional Court was delivered by Chief Justice Latchford (57 O.L.R. 365). The judgment appealed from was reversed. The Chief Justice, writing the judgment of the whole Court, reviewed the evidence and came to the conclusion that the Chief Justice of the Common Pleas was in error in thinking that Disney had misrepresented the transaction to Howich and so had precluded himself from enforcing any rights that he might otherwise have had; and then having come to that conclusion, that Disney was not to be charged with fraud, the Court came to the conclusion that the Chief Justice of the Common Pleas, notwithstanding all that he had said about the merging of the negotiations and so on in the conveyance and the conveyance being the only thing that could be looked at, ought to have given judgment in Disney’s favour enforcing the obligation. The Court did not in any sense overlook, and it was impossible to overlook, what the Chief Justice of the Common Pleas had said on that point, and the Chief Justice in Appeal referred to it at page 370 of the report. He says:

“It is true that the deed from Disney does not refer to the mortgages and contains no covenant on the part of the pur-

chaser to assume and pay them off; but, having regard to the facts manifest in the transaction, . . . ” [that is the fact that it was the intention that Mrs. Howich should pay the mortgages] “ . . . there was, in my opinion, an implied obligation on her part so to do.”

And he proceeds then to discuss the question whether that obligation is an equitable obligation or what it is, and he reviews the cases that bear on that inquiry. The Court reversed the judgment of the Chief Justice of the Common Pleas and enforced the obligation.

Then, in *Esser v. Pritzker* (1926), 58 O.L.R. 537, an appeal decided about five months after the Divisional Court's pronouncement in *Disney v. Howich*, Mr. Justice Logie had a case in which, as he said,—there was an agreement in the words of the agreement that we have in the present case—in the conveyance there was no mention made of the encumbrances but, on the contrary, the grantors covenanted that they had done no act to encumber the lands. The defendant's counsel had argued, on the authority of *Leggott v. Barrett* (1880), 15 Ch. D. 306, as counsel in the present case did, that you cannot go outside of the deed for an implied covenant, and that the agreement containing the so-called express covenant is merged in the higher instrument, and Mr. Justice Logie went on to say that the argument, though ingenious, was fallacious when attempted to be applied in *Esser v. Pritzker*, as appears from the judgment in *Disney v. Howich* by which, as he puts it, the Court held that the real transaction was to be looked at, regardless of the form in which it was carried out. Mr. Justice Logie's judgment was upheld by a Divisional Court of five Judges of whom three, Chief Justice Latchford, Mr. Justice Middleton and Mr. Justice Orde, had been parties to the judgment in *Disney v. Howich*. Mr. Justice Orde alone gave reasons for his judgment; the other members of the Court simply agreed that the appeal must be dismissed with costs. Perhaps it is unfortunate that they did not say whether it was because they agreed with Mr. Justice Logie or whether it was because they agreed with Mr. Justice Orde in thinking that in the result Mr. Justice Logie had reached the right conclusion, or whether they followed his reasons, but the fact is that they did dismiss the appeal. Mr. Justice Orde, at pages 541 and 542, used some language which has been the subject of much analysis in the argument of the present case. He passed over as unneces-

sary for decision in *Esser v. Pritzker* the question whether the terms of the express agreement would have merged in an obligation arising by implication; but he stated that, while an obligation on the part of the grantee to indemnify the grantor when the conveyance is expressed to be subject to a mortgage is implied, it was too absurd to suggest that in a conveyance in which the grantor expressly covenanted that he had done no act to encumber the lands such an obligation could arise by implication. He did not say that he found any fault with what Mr. Justice Logie had decided, he did not indicate that he had any doubt about the correctness of the decision in *Disney v. Howich* to which he was a party, and I think he meant no more than that one was not to read a covenant to indemnify into a deed of conveyance when the deed itself contained no such covenant and did contain a covenant by the grantor against encumbrances. I think that that is more or less apparent from the next paragraph; because there he says that in *Esser v. Pritzker* the obligation to indemnify Roberts must of necessity arise either out of the language of the agreement or from the fact that it was a term of the bargain that the assumption of the mortgage should form part of the consideration, and after that he refers to *Disney v. Howich*. So that even his language does not seem to indicate that he thought that in circumstances like these you must not look at the agreement to help you to ascertain whether it was part of the bargain that the assumption of the mortgage should form part of the consideration for the conveyance of the equity of redemption. He then went on to say that, if there had been by the defendants a setting up of the express covenant against encumbrances as an answer to the plaintiff's claim, it was possible that all the evidence that was taken in *Esser v. Pritzker* might have been rejected; but he held that the defendants, not having set up that contention either in their pleadings or at the trial, were precluded from setting it up; and so he passed over the question as to the merger of the agreement in the conveyance and expressed himself as being in favour of enforcing the obligation which Mr. Justice Logie had enforced; so that really all that he had said before was *obiter*. The defendants were precluded from setting up certain contentions, and it was unnecessary to consider what the effect of them would have been if they had been set up. And so even if what Mr. Justice Orde said had been said for the Court, I should not have felt bound by it, in

the face of *Disney v. Howich* and the affirmance of Mr. Justice Logie's judgment, to hold that the present actions are not maintainable; but it is not expressed to be part of the opinion of the whole Court, and if it conflicts with *Disney and Howich* I think it is to be disregarded. I do not think it does so conflict, because, as I say, I think Mr. Justice Orde—as the Chief Justice of the Common Pleas had done in the earlier case—was directing his attention to the document of transfer and to the question whether into that document you could read a covenant, and I do not think he was laying it down that where you have an agreement for the assumption of the mortgage and then a conveyance in which nothing is said about mortgages you cannot enforce the obligation of the assignee of the equity to indemnify the mortgagee. I am inclined to think that that obligation arises not so much from contract or implied contract as from the nature of the case itself when the assumption of the mortgages is part of the consideration; and I can find nothing in *Esser v. Pritzker* to say that in this case, in which the conveyance is expressed to be for valuable consideration and the sum of one dollar, there is anything to preclude the enforcement by the mortgagor of the obligation to pay that valuable consideration by paying off the mortgages—if there is, I have quite failed to understand *Disney v. Howich*.

My conclusion of the whole matter is that the plaintiffs respectively are entitled to the judgments for which they ask. In the case of the Assurance Company counsel say that a reference will be necessary because the Assurance Company has been in possession and is receiving rents and the state of the accounts is changing daily. In the other case it is admitted that no reference is requisite, and that judgment, if there is to be one, will be for the amount claimed in the statement of claim.

As I have said, in the Assurance Company's case there is no controversy as to the right to foreclosure; and judgment for that will go in the usual way.

The defendant will have to pay the costs.

My reasons for judgment have been stated at inordinate length, but there are two matters to which I did not refer and to which I should like to refer:

First, in the Linton case I think the defendant is estopped from denying his assumption of the mortgage. His letter, Exhibit 20, was written deliberately, it makes a statement of fact

on which he intended Linton to act, and Linton did act upon it by taking over the mortgage in part payment of a debt. I think that that estoppel was by itself almost sufficient to decide the Linton case.

The other matter is sec. 10 of the Conveyancing and Law of Property Act, R.S.O. 1937, ch. 152, which says that an exchange shall not imply any condition in law.

Mr. Henderson, notwithstanding all the cases in which upon an exchange the grantee's obligation to indemnify the mortgagor has been held to arise, contends that this section means that the obligation did not arise in this particular case. Without entering upon any discussion as to what the words "imply any condition in law" mean, I think I ought to state shortly that I did not overlook the argument, but that my opinion was that the obligation here sought to be enforced was not a condition in law within the meaning of the statute, but an obligation which arose in the way stated in *Disney v. Howich* and the other cases.

The defendant appealed to the Court of Appeal from the judgments of Rose C.J.H.C. in both actions.

October 1st and 2nd, 1940. The appeals were heard by RIDDELL, MASTEN and MCTAGUE JJ.A.

A. G. Slaght, K.C., and *C. B. Henderson*, K.C., for the defendant Johnson, appellant, contended that since there was no reference in the deed from McGillivray to the defendant of any obligation by the defendant to assume the mortgages resort could not be had to the preliminary agreement to establish such obligation. When a written agreement is carried into effect by a deed of conveyance the conveyance becomes the final evidence of the intention of the parties and is not liable to be varied by reference to the agreement: *Leggott v. Barrett* (1880), 15 Ch. D. 306, at p. 311; *North Eastern Railway Co. v. Hastings*, [1900] A.C. 263.

Even if there were an obligation on the defendant to indemnify the grantor any action with respect thereto must have been brought within six years after the cause of action arose, the obligation to indemnify not having been created by a document under seal: The Limitations Act, R.S.O. 1937, ch. 118, sec. 48 (1) (g); *Lewington v. Raycroft*, [1935] O.R. 440, 474.

Section 17a of The Mortgages Act, as added by 1939, ch. 28, sec. 1, is not retroactive and does not apply to give the plaintiffs

a right to personal judgment against the defendant when the transaction by which the defendant acquired the equity of redemption took place before the amendment came into force: *Bullas v. Empire Life Assurance Co.*, [1931] O.R. 769, 776; *Winter v. Trans-Canada*, [1934] O.R. 318, at p. 323; *West v. Gwynne*, [1911] 2 Ch. 1; *Upper Canada College v. Smith*, 61 S.C.R. 413.

R. L. Kellock, K.C., and *R. S. Joy*, for the North American Life Assurance Company, plaintiff, respondent, contended that no question really arises as to whether sec. 17a of The Mortgages Act should be given a retroactive effect and the section applies according to its plain words to the situation in the present case: see *West v. Gwynne*, [1911] 2 Ch. 1, per Buckley L.J. at pp. 11 and 12.

The defendant, by virtue of the terms of the agreement for exchange, was bound to indemnify McGillivray with respect to the mortgage; in any event the defendant was under an implied obligation to indemnify McGillivray: *Disney v. Howich* (1925), 57 O.L.R. 365; *Esser v. Pritzker* (1926), 58 O.L.R. 537; *Walker v. Dickson* (1892), 20 O.A.R. 96.

The defendants' obligation to indemnify McGillivray was not barred by The Limitations Act when this action was commenced. The acceleration clause in the mortgage provides that acceleration takes place only at the option of the mortgagee and such option was not exercised until the writ in this action was issued: *Lewington v. Raycroft*, [1935] O.R. 440.

S. Rogers, K.C., for the plaintiff Linton, respondent, adopted the submissions of counsel for The North American Life Assurance Company and contended that since the conveyance from McGillivray to Johnson was stated to have been made "in consideration of other valuable consideration and the sum of \$1.00" evidence was admissible to show the true consideration: Halsbury, 2nd ed., vol. 10, p. 267, para. 333.

Cur. adv. vult.

October 12th, 1940. The judgment of the Court was delivered by McTAGUE J.A.:—There seems to be no dispute about the facts of this case. In the year 1931 J. H. McGillivray was the registered owner of 989-991 Queen Street East, Toronto. By a first mortgage dated May 9th, 1931, he mortgaged the lands to the North American Life Assurance Co. to secure the sum

of \$14,000.00 and interest. Part of the principal money was to be paid in half-yearly instalments and the remainder on the 1st day of May, 1936.

By a second mortgage dated August 21st, 1931, he mortgaged the lands to one Rosnick to secure payment of \$7,000.00 and interest. This mortgage is now held by the plaintiff Linton under an assignment from Posnik dated March 31st, 1932—the assignment having been made for valuable consideration.

By a deed dated August 21st, 1931, McGillivray conveyed his equity to Johnson. This conveyance was made pursuant to an agreement for exchange of lands dated August 14th, 1931. The agreement for exchange contained the provision, "Each party hereby covenants to assume the encumbrance, if any, as stated herein on the property conveyed to him by the other." The learned trial Judge has found on the evidence, and I entirely agree, that apart altogether from the agreement for exchange, it was in contemplation by both Johnson and McGillivray that when the exchange was effected, Johnson should be responsible for the two mortgages here in question, and McGillivray should be responsible for the mortgages on the properties conveyed by Johnson.

Subsequent to the transaction with McGillivray, Johnson made two small payments on account of principal to the North American Life Assurance Co., and continued to pay the interest throughout. He also paid Linton interest on the second mortgage down to the 6th day of September, 1936, although he has not made any principal payments.

In the Assurance Company case what is claimed is foreclosure and a personal judgment against Johnson. In the Linton case what is claimed is merely a personal judgment. There is no denial of the right of the Assurance Company to foreclosure; the controversy in each case is as to Johnson's personal liability.

The Assurance Company founds its right to judgment against Johnson upon an assignment dated November 20th, 1939, from McGillivray of Johnson's covenants, express or implied, and of all McGillivray's rights of action, and also upon the amendment to The Mortgages Act, R.S.O. 1937, ch. 155, contained in sec. 1 of ch. 28 of the Ontario statutes of 1939, by which was added to sec. 17 of the principal Act a section, 17a(1):

"Notwithstanding any stipulation to the contrary in a mortgage, where a mortgagor has conveyed and transferred the

equity of redemption to a grantee under such circumstances that the grantee is by express covenant or otherwise obligated to indemnify the mortgagor with respect to the mortgage, the mortgagee shall have the right to recover from the grantee the amount of the mortgage debt in respect to which the grantee is obligated to indemnify the mortgagor."

There follows a proviso not pertinent to this case. In the Linton case the claim is founded upon the same statute, and upon an assignment from McGillivray dated November 20th, 1939.

The defendant sets up three principal defences, (1) that no evidence is admissible which goes back of the deed dated August 21st, 1931, and that the deed itself contains no covenant, express or implied, on Johnson's part to assume and pay the mortgages in question; (2) that the claim, in so far as it is founded on the assignments, is barred by the Statute of Limitations; (3) that the 1939 amendment is prospective only in its operation, and no action can be founded upon it against this defendant. The learned Chief Justice of the High Court tried the action and gave no effect to the defences set up. The plaintiffs recovered judgment for the full amount of their respective claims on the 23rd day of May, 1940. From these judgments the defendant appeals.

As to the first defence, the defendant relies on *Leggott v. Barrett* (1880), 15 Ch. D. 306, at p. 311, where it is laid down that when a written agreement is carried into effect by a deed, the deed becomes the final evidence of the rights of the parties, and is not liable to be varied by reference to the agreement. No doubt this is a recognized general principle. One has no right to look at the agreement for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself. But I think it is an equally well recognized principle that, for the purpose of construing the contract as evidenced by the deed, one may look at evidence to explain what is meant in the deed by expressions not entirely clear or self-explanatory. Thus, in the deed here, dated 21st day of August, 1931, the consideration is expressed to be "other valuable consideration and the sum of \$1.00." To interpret properly the contract between the parties one must know what is meant by "other valuable consideration", and evidence is admissible to ascertain what was meant by that expression. Once the negotiations between the parties and the preliminary agreement for exchange are examined, it becomes

apparent that the other consideration referred to means the assumption and payment of the mortgages in question. In other words, the preliminary agreement has not diminished, enlarged or modified the rights of the parties. It has been merely one of the means of ascertaining what a certain expression in the deed really meant. The deed itself still governs the rights, but the ambiguous expression has been cleared up. See Halsbury, 2nd ed., vol. 10, p. 267.

The principle involved has been dealt with in this Court in the cases of *Disney v. Howich* (1925), 56 O.L.R. 606, on appeal (1925), 57 O.L.R. 365, and *Esser v. Pritzker* (1926), 58 O.L.R. 537. In the *Disney* case Meredith C.J.C.P. gave effect to the appellant's contention here that you cannot go behind the conveyance, although his judgment was primarily based upon fraudulent misrepresentation practised upon the defendant by the plaintiff. The Court of Appeal reversed the judgment, Latchford C.J.A. suggesting that the matter could be put upon the basis of equitable obligation as in *Waring v. Ward* (1802), 7 Ves. 332, or on implied contract as in *Dodson v. Downey*, [1901] 2 Ch. 620, although I rather gather that he finally rested his judgment on this, that both the defendant and her husband having understood that the mortgages upon the plaintiff's property were to be assumed and paid by her, the assumption of the mortgages was part of the consideration. In *Esser v. Pritzker* the same defence was put before Logie J., the trial Judge. Logie J. refused to give effect to it, stating his view that the effect of the Court of Appeal judgment in *Disney v. Howich* was that the whole transaction was to be looked at, regardless of the form in which it was carried out. While I think this is too sweeping a statement of the law or what the Court of Appeal decided in the *Disney* case, the judgment of Logie J. was upheld. Orde J.A. delivered the only written judgment on appeal. The other Judges simply concurred in dismissing the appeal. In his reasons, Mr. Justice Orde used language with respect to implied covenants to assume a mortgage in a deed containing a specific covenant that the grantor has done no act to encumber the lands, which superficially seems to afford some consolation to the appellant here. The discussion to which I refer was not pertinent to the only real issue, namely, as to whether the mortgage debt was wiped out because the mortgagee released the mortgagor from his covenant to pay upon the

mortgagor assigning his rights against a subsequent owner of the equity of redemption.

The question of liability here need not be put upon the basis of equitable obligation as in *Waring v. Ward*, although I do not say that such doctrine does not apply. It falls squarely within the principle that the assumption and payment of the mortgages was part of the consideration referred to in the deed itself. Accordingly, I think the learned Chief Justice was right, not only in admitting the evidence objected to, but also in his conclusion that effect cannot be given to this particular defence.

On the defence of the Statute of Limitations, the defendant claims that if the actions are founded on the assignments dated November 20th, 1939, then the actions being founded on simple contract, must be begun within six years of the date the cause of action first arose, and he contends that that period has long since expired. As already pointed out, the defendant has made two small payments on account of principal on the North American Life mortgage, and has continued to pay the interest. On the Linton mortgage he has paid the interest down to September 6th, 1936, but has paid no principal. In so far as the actions are based on the assignments, the plaintiffs, of course, are in no better position than McGillivray. The defendant's contention then is that before the commencement of the action McGillivray had lost not only the right to compel payment of all moneys that fell due more than six years before the commencement of the action, but also all right to enforce Johnson's obligation to pay the balance of the mortgage moneys. As the learned Chief Justice has pointed out, the latter contention is based upon the assumption that as soon as there was any default in payment of principal McGillivray's right to compel Johnson to pay the whole of the principal became enforceable. The terms of the respective mortgages dispose of such an assumption, because both contained acceleration clauses providing that on default of payment of interest the whole of the principal shall become payable *at the option of the mortgagee*. But the mortgagees did not exercise the option until these actions were commenced, and therefore McGillivray had not lost his right of action to compel Johnson to pay. Of course, McGillivray's right of action to compel payment of instalments of principal which fell due more than six years prior to the issue of the writs is quite a different matter, depending upon whether his payments of interest to the

mortgagees have served to stop the statute running against McGillivray.

The learned Chief Justice, in dealing with this latter problem, took the view that if the payments of interest had been made to McGillivray direct instead of to the mortgagees, they would have sufficed to keep alive McGillivray's right of action for the principal. There could have been implied from them a renewed promise by Johnson to McGillivray to pay the principal money. But he also considered that as Johnson might have paid for one of two reasons, either on his obligation to McGillivray, or for the sole purpose of preserving his equity from foreclosure, it was perhaps impossible to attribute his payments to the intention of performing his obligation to McGillivray.

While I am in entire agreement with the learned Chief Justice that the matter presents its difficulties, it seems quite clear that, whatever the intention or motive may have been, Johnson's payments were in fact on account of his obligation to McGillivray. He had no legal obligation other than to McGillivray, with respect to paying the interest on the mortgages. As between himself and the mortgagee, he was McGillivray's agent in making the payment, and his payments stopped the statute running against the mortgagees as far as McGillivray was concerned. See *Coleman et al. v. Yarmolinsky et al.*, [1935] O.R. 266. As between himself and McGillivray, he was McGillivray's debtor, making payments to McGillivray's creditors.

The general rule, of course, is that the payments on account must be made to the creditor or his agent. However, the exception has been made more than once that payments made by arrangement for the benefit of the creditor are, for the purpose of the statute, to be regarded as payments to the creditor. See *Bodger v. Arch* (1854), 10 Exch. 333, approved and followed in *Wilson and Wilson, Ex parte Wilson v. The Trustee of a Deed of Arrangement*, [1937] 1 Ch. 675. In *Worthington v. Grimsditch* (1845), 7 Q.B. 479, at p. 484, Denman C.J. put the principle thus: "The payment by the debtor of money owing by the creditor to a third person may be a mode of payment either of interest, or, in part, of the principal to the creditor; and such agreement, like any other, may be proved by implication, a course of dealing or ratification, as well as by express and previous direction." See also Lightwood's *Time Limit of Actions*, p. 381, and Darby and Bosanquet's *Statute of Limitations*, 2nd

ed., at pp. 114 and 115. In the case at bar, Johnson's payments to both mortgagees were on account of his obligation to McGillivray and for the benefit of McGillivray. This was the mode of payment, and the agreement that it should be the mode is not difficult to infer from the course of dealing. Accordingly, I am of the opinion that the defence of the statute cannot prevail.

In the view I have taken of the matter, the plaintiffs are entitled to their respective judgments on the basis of their assignments from McGillivray, so that it becomes unnecessary to deal with the action in so far as it is founded on the 1939 amendment to The Mortgages Act, and I refrain from so doing. As to whether Lord Coke's rule *nova constitutio futuris formam imponere debet, non praeteritis* applies, or whether *West v. Gwynne*, [1911] 2 Ch. 1, governs the situation, I am content to leave to another occasion.

Both appeals should be dismissed with costs.

Appeals dismissed with costs.

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